



Employment Agreements:

Clarify approval authority to increase transparency and reduce risks

January 2020

A Report by the Office of the Auditor

Brian Evans

Metro Auditor

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MEMORANDUM

January 22, 2020

To: Lynn Peterson, Council President
Shirley Craddick, Councilor, District 1
Christine Lewis, Councilor, District 2
Craig Dirksen, Councilor, District 3
Juan Carlos Gonzalez, Councilor, District 4
Sam Chase, Councilor, District 5
Bob Stacey, Councilor, District 6

From: Brian Evans, Metro Auditor

Re: Audit of Employment Agreements

This report covers the audit of employment agreements which included employment separation agreements within its scope. Metro Code has different approval requirements for each type of agreement. Employment agreements required Council approval. In contrast, separation agreements were considered part of the Chief Operating Officer's authority and did not require Council approval.

We found approval authority for some agreements and subsequent amendments was unclear, which reduced transparency and accountability. A 2014 ordinance that delegated Council's approval authority to the COO in certain situations caused confusion. We also found similar provisions in some employment and separation agreements that raised questions about the appropriate approval process. These issues increased financial and compliance risks.

As part of the audit, we estimated the cost of the separation agreements Metro has reached with employees over the last five fiscal years. We then compared Metro's annual average amount per agreement with benchmark data. The analysis indicated Metro had managed employment separations well, on average, to keep the financial impact to the agency relatively low.

We have discussed our findings and recommendations with Andrew Scott, Interim COO; Carrie MacLaren, Metro Attorney; and Nathan Sykes, Deputy Metro Attorney. A formal follow-up to this audit will be scheduled within five years. We would like to acknowledge and thank all of the employee who assisted us in completing this audit.

Summary

Employment and separation agreements create a contract between an employee and Metro. These agreements can reduce risks when an employee departs, while recognizing the service and contributions the employee made on the agency's behalf.

Metro Code has different approval requirements for employment agreements and separation agreements. Employment agreements required Council action, while separation agreements were considered part of the Chief Operating Officer's (COO) authority to appoint and terminate employees. We found a couple of examples that raised questions about which approval method was appropriate based on the provisions contained in each type of agreement.

In 2014, Metro Council changed the Code to allow the COO to approve employment agreements under two conditions if the Council delegated their authority by resolution. Some of the agreements approved by the COO did not appear to meet the criteria for delegation in Metro Code.

Misalignments between Code requirements, delegation resolutions, and some employment agreements appeared to be caused by three factors:

- Mixing the criteria for case-by-case approvals and group approvals.
- Unclear review for compliance with Code.
- Lack of clarity about who had the authority to approve amendments.

Without more specificity in resolutions about who the delegation applies to and when its sunsets, it is possible the COO would never have to return to Council to get approval for any director level employment agreement in the future.

Metro's use of employment agreements has been inconsistent over time. The COO and Metro Attorney were the only positions required to have one per Code. Lack of employment agreements could increase the amount paid to some employees when they leave service. Conversely, depending on the provisions in the contract, an employment agreement could result in unknown financial impacts if certain provisions were not controlled.

We estimated the cost of the separation agreements Metro has reached with former employees over the last five fiscal years. We then compared Metro's annual average amount per agreement with benchmark data. The analysis indicated Metro has managed employment separations well, on average, to keep the financial impact to the agency relatively low.

We made five recommendations to clarify approval authority, and reduce financial and compliance risks.

Background

Employment and separation agreements create a contract between an employee and Metro. Most employees at Metro do not have these agreements. The conditions of their employment are based on personnel policies that apply to all employees, and collective bargaining agreements for those represented by a union.

For a variety of reasons, outlining the rights of the employee, and Metro as their employer, at the beginning of employment can be helpful to both parties. These agreements can reduce risks to Metro when a senior or executive employee departs, while recognizing the service and contributions the employee made on the agency's behalf.

Since 2003, at least 28 employment agreements were created. Most of these were for department director positions. They were also created for the Chief Operating Officer (COO), Metro Attorney, Deputy COO, General Manager of Visitor Venues, and the Council President's Chief of Staff. The COO and Metro Attorney are the only positions required to have an employment contract.

Metro Code 2.02 outlines the requirements for approving employment agreements. It requires Council approval in addition to a signature by the Council President or COO, and the employee. It states:

“No contract of employment can be created, nor can an employee's status be modified, by any oral or written agreement, or course of conduct, except by a written agreement signed by the Council President or Chief Operating Officer and the employee, and subject to the approval of the Council.”

In 2014, Council approved a change to the Code that gave the COO the authority to approve employment agreements in some situations. We were told this was done to give the COO flexibility to negotiate employment terms with the top candidate for the position.

Employment separation agreements have also been created with some employees near the end of their time working at Metro. While these agreements were employment related, they were considered to be within the COO's authority to appoint and dismiss employees, and not subject to Council approval.

This audit was initiated based, in part, on a concern raised about the appropriateness of a payment made at the end of service. The payment resulted from a separation agreement. In the process of making that determination, it became clear that similarities and differences between the two types of agreements caused confusion, which increased financial and compliance risks, and reduced transparency.

Results

Delegated authority to approve employment agreements reduced transparency and accountability

In 2014, Metro Council approved an ordinance amending the personnel code. The change allowed the COO to approve employment agreements under two conditions if the Council delegated their authority by resolution:

- On a case-by-case basis, or
- For a group of director level employees where all terms were identical except for salary.

Since the change, Council has passed at least five resolutions delegating authority to the COO. Four of the resolutions were for individual positions. The fifth resolution allowed the COO to approve agreements with Metro Department Directors. These resolutions resulted in at least nine employment agreements, including one amendment to an agreement.

Exhibit 1 Council delegated approval authority to the COO five times, resulting in nine employment agreements

Resolution # (date)	Position(s)	Employment Agreements (date)
15-4600 (1/15/15)	Interim Oregon Zoo Director	• Interim Oregon Zoo Director (1/21/15)
15-4627 (5/7/15)	General Manager of Visitor Venues	• Interim Oregon Zoo Director and General Manager of Visitor Venues (6/2/15)* • Interim Oregon Zoo Director and General Manager of Visitor Venues (12/28/15)*
16-4682 (1/12/16)	Oregon Zoo Director	Oregon Zoo Director (1/20/16)
17-4778 (3/2/17)	General Manager of Visitor Venues	General Manager of Visitor Venues (4/25/17)
17-4797 (5/25/17)	Metro Department Directors	• Parks and Nature Director (6/29/17) • Deputy COO (5/15/18) • Human Resources Director (3/29/19) • Chief Financial Officer (10/7/19)

Source: Auditor's Office analysis and Office of Metro Attorney analysis of delegation resolutions and resulting employment agreements.

**Employee was serving temporarily as the Interim Oregon Zoo Director while retaining their prior position as General Manager of Visitor Venues.*

Some of the agreements approved by the COO did not appear to meet the criteria for delegation in Metro Code. Approval for one of the agreements was delegated on a case-by-case basis, which indicated that one agreement would be approved. The COO later amended that agreement without additional Council action. In addition, the terms for three of the department director agreements that were delegated for approval as a group were not *identical except for salary* as required by Metro Code.

Another agreement was approved based on the resolution delegating authority to approve department director agreements, but the position was not a department director. Department Director is defined as "...a person designated by the Chief Operating Officer to be responsible for the administration of a department or his/her designee." Several department directors reported to the position, but it was not directly responsible for administering any department itself.

Misalignments between Code requirements, delegation resolutions, and some employment agreements appeared to be caused by three factors:

- Mixing the criteria for *case-by-case* approvals and *group* approvals.
- Unclear review for compliance with Code.
- Lack of clarity about who had the authority to approve amendments.

Mixing criteria

The resolution delegating authority to approve department director positions (Resolution 17-4797) stated that it was for *case-by-case* approvals, even though the delegation was for a *group* of director level positions. None of the agreements approved using that delegation authority included all the same provisions except for salary. As a result, the requirement that a *group* of director level employees all have the same terms except salary was not met. This may have happened, in part, because the complete language from Code was not included in the staff report to the resolution.

Exhibit 2 Staff reports did not include a key requirement from Metro Code

Metro Code	Staff Reports
<p>Metro Council may delegate by resolution to the Chief Operating Officer the authority to execute written employment agreements on a case by case basis, or as a group for Director level employment agreements where all terms in those employment agreements are identical except salary.</p>	<p>...allowing the Metro Council to delegate authority to the Chief Operating Officer ("COO") by resolution to execute written employment agreements on a case by case basis, or as a group for Director level employment agreements.</p>

Source: Auditor's Office analysis of delegation resolutions and Metro Code 2.02.010.

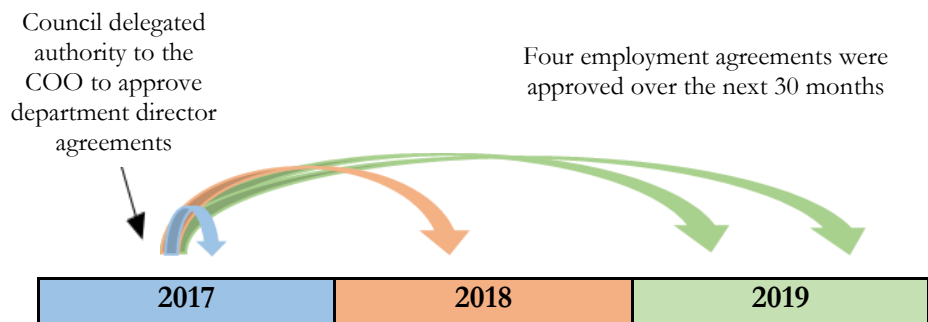
In addition to not meeting Code requirements, approving a group of agreements on a case-by-case basis reduced transparency and accountability. Transparency was reduced by not listing the specific positions that were delegated for approval in the resolution. This appears to have created an opportunity for the COO to approve an agreement with an employee who was not a Department Director without additional approval. It could also potentially be used to approve an unlimited number of agreements without additional Council action.

The other time Metro Council approved a group of department level employment agreements, the resolution included the specific position and employee in that position. This made it clear which positions were being approved and with whom those agreements were made. That specificity was not included in the 2017 group delegation resolution.

It was unclear if the authority delegated to the COO could be used to approve subsequent agreements with a different employee who later served in the same director level position. It was also unclear if Metro’s venue directors would be considered part of this delegation authority. Without more specificity in resolutions about who the delegation applies to and when its sunsets, it is possible the COO would never have to return to Council to get approval for any director level employment agreement in the future.

While these potential scenarios are theoretical, there was some evidence that these risks were becoming reality. The delegation resolution for department directors was approved in May 2017, but only one agreement was approved by the COO that year. A year later in May 2018, another agreement was approved. In 2019, two additional department director agreements were approved.

Exhibit 3 Some employment agreements were approved a year or more after Council delegated their authority



Source: Auditor’s Office analysis of employment agreements, delegation resolutions, and dates of changes to Council and key personnel.

The time lag between Council delegation for department directors, and COO approvals in 2018 and 2019, raised questions about accountability. Three of the seven Metro Council representatives have changed since the 2017 resolution passed. The COO and Metro Attorney positions also changed during that time. All these changes increased the risk that key decision-makers may not have been fully informed about the delegation requirements, previous delegation resolutions, and timeline of approvals.

Unclear review for compliance with Code

To its credit, Metro added an additional requirement that the Office of Metro Attorney (OMA) review the employment agreements that were delegated for approval to the COO. Having additional review can increase transparency and also reduce the chance that a provision in an agreement could be challenged. OMA signed these agreements “approved as to form.” That phrase was undefined, but appeared to mean the agreement used an appropriate template and some level of review was completed.

We found inconsistent information in some of the agreements about what OMA’s review and signature meant. Two agreements included statements that stated the COO was properly delegated the authority to enter into the agreement. Those statements also referenced the Code requirements for approving employment agreements. None of the other agreements included that statement or any references to Code. That may mean OMA’s signature was only related to the form of the agreement, without additional review to determine if the process to approve the agreement was done appropriately.

Lack of clarity about amendment authority

Amendments to employment agreements raised more questions about the appropriate approval process. One employee’s agreement was amended twice after it was originally approved. The first amendment was about one year after Council approved the original agreement. The second amendment was seven years after the original agreement was approved.

We were told the employee’s performance review was the basis for the amendments and that Council signed the performance review. Both amendments were signed by the Council President, but not approved by Council through a resolution.

Another employee’s employment agreement was amended without approval by Council. The change was to the dates the employee would end their interim job and restart in their normal position. Changing the dates could be considered part of the COO’s authority to appoint and dismiss employees. However, it raised questions about how much flexibility the COO had to amend existing agreements.

Amendments to existing agreements reduced transparency and could create confusion about accountability. For example, it was unclear if the delegation authority approved by Council extended to subsequent amendments. If it did, the COO could amend existing agreements with little oversight, which could result in provisions that were substantially different from the original agreement.

Inconsistent use of employment agreements created different relationships between Metro and its leadership positions

Metro's use of employment agreements has been inconsistent over time. The COO and Metro Attorney were the only positions required to have one per Code. At least thirteen other positions have had one since 2003. We found no patterns to help determine why some positions had agreements and others did not.

As of October 2019, eight positions had employment agreements in place. Seven department director or venue director positions did not have an agreement. Two positions were vacant. Management stated that they planned to create employment agreements with all director level positions. Inconsistent use of employment agreements created different relationships between Metro and employees in leadership positions. These differences can impact the financial risks Metro has to manage at the end of an employee's service to the organization.

Lack of employment agreements could increase the amount paid to some employees when they leave service. If there was no agreement, employers may have fewer options to limit end of service payments related to vacation payouts, insurance coverage and other potential separation provisions. At least three employees who did not have an employment agreements received several settlement agreements as they approached the end of their time working at Metro.

Conversely, depending on the provisions in the contract, an employment agreement could result in unknown financial impacts if certain provisions were not controlled. For example, one employment agreement resulted in a significant payout at the end of service because vacation accrual was not capped. This resulted in a large lump sum payment by Metro (\$230,000), and a significant increase in retirement payments (\$37,000 annually) to the employee by the Public Employee Retirement System (PERS).

While neither agreement type was guaranteed to result in a better financial situation for Metro, committing to one strategy - either all senior positions have employment agreements, or none do - can make it easier to evaluate tradeoffs and provide consistent treatment of employees across leadership positions, and over time for the same position.

Employment agreements have the added benefit of providing more transparency. This is because the approval process for employment agreements requires Council approval and the agreements themselves are public records. In contrast, separation agreements did not require Council approval and some of them included confidentiality provisions, which may prevent them from being released through a public records request.

Similar provisions in employment and separation agreements raised questions about the appropriate method of approval

Metro Code has different approval requirements for employment agreements and separation agreements. Employment agreements require Council action, while separation agreements were considered part of the COO’s authority to appoint and terminate employees. However, we found a couple of examples that raised questions about which approval method was appropriate based on the provisions contained in each type of agreement.

Some separation agreements included provisions that were similar to employment agreements, and vice versa. For example, one separation agreement included additional financial benefits for staying in the position past certain dates. That provision was similar to some employment agreements, but it was an outlier for separation agreements. Conversely, one employment agreement included a resignation date for the position. That provision was common in separation agreements, but an outlier for employment agreements.

When similar provisions can be approved using either process, transparency and accountability can be compromised. These risks could be reduced by effective controls to ensure the type of agreement and method of approval were appropriate. Greater transparency through public records like Council resolutions can help for some types of agreements. But, for more sensitive agreements, like separation agreements, OMA was uniquely positioned to reduce these risks. That was because they advised on legal risks, interpreted Metro Code and ordinances, and were required in some cases to sign the agreements.

One of the benefits of employment agreements was that they set expectations between the employee and the employer about how they will handle the end of employment. All the employment agreements reviewed in this audit, other than those for interim appointments, included termination provisions that outlined the financial and other considerations that would be made under various scenarios. If no employment agreement was in place, costs may vary more widely.

To manage the risk of increasing costs to address claims, separation agreements were created in some circumstances. The agreements typically required the employee to waive all claims against the employer in exchange for financial benefits or other considerations. The agreements were intended to reduce the potential for larger impacts that could result from claims against Metro.

There were examples of more than one separation agreement for the same employee. This indicated that Metro was willing to provide additional considerations to some employees even after they had agreed to waive any potential claims. In some situations multiple agreements with the same employee were reached within two or three months of each other, while agreements with another employee were spaced out over almost a year. Multiple separation agreements may be needed if the employee’s last date of

employment changed after the initial agreement was signed. However, this was only the case for one of the four subsequent separation agreements.

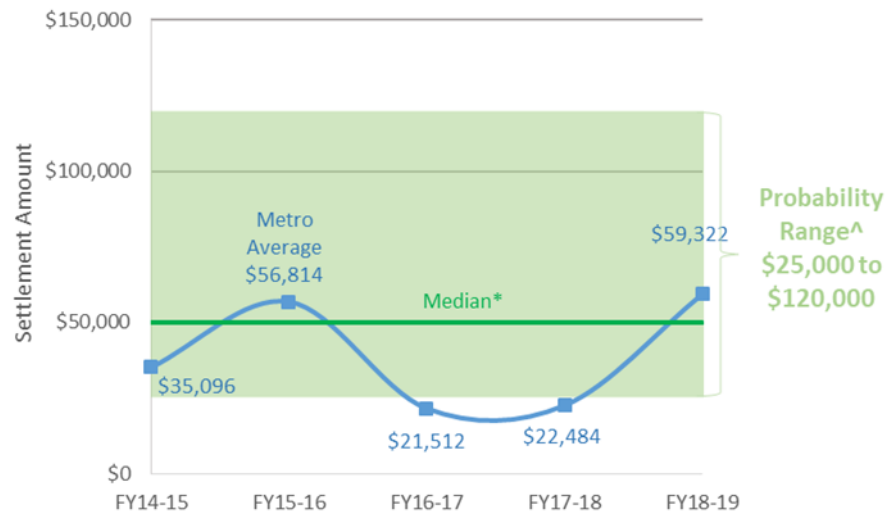
We also identified another weakness that could increase financial and compliance risks. In some cases the COO’s authority to approve separation agreements appeared to have been delegated to other positions. For example, about half of the separation agreements were not signed by the COO, which indicated the COO may have delegated their authority to other positions. We did not attempt to locate documentation of the COO delegating their approval authority for each agreement. However, a delegation memo from the COO in January 2019 did not appear to include separation agreements within its scope.

Separation payments were consistent with benchmark amounts

We estimated the cost of the separation agreements Metro reached with former employees over the last five fiscal years. The costs associated with individual agreements ranged from zero to several hundred thousand dollars. We did not review the details of each separation agreement, but the variation in amounts was likely the result of the unique circumstances of each employee, their position, and the duration of their time at Metro.

We then compared Metro’s annual average amount per agreement with benchmark data. The analysis showed Metro’s average settlement amount was consistent with benchmarks.

Exhibit 4 Metro’s average settlement amount was within or below the expected range during each of the last five years



Source: Auditor’s Office analysis of Metro’s estimated separation amounts and settlement data from Thomson Reuters’ *Employment Practice Liability: Jury Award Trends and Statistics, 2018 Edition*. Metro averages were not adjusted for inflation.

*The median is the middle settlement value among all settlements from 2011-2017 listed in ascending order. This value provides the most accurate gauge of the norm for a specific sampling of settlement data.

^The probability range is defined as the middle 50 percent of all settlements arranged in ascending order in a sampling, 25 percent above and below the median award. Although settlements rarely produce a normal distribution, the probability range and the median settlement does aid in establishing parameters of where settlements tend to cluster.

As the graph shows, in two of the last five years Metro's average was slightly more than the median amount, but still within the expected (probability) range of outcomes. In three of the years, Metro's average was below the median, and below even the low end of the expected range in two years. The Metro Auditor conducted a similar analysis in 2005 and found the average at that time was about \$38,000 in today's dollars, which was similar to Metro's most recent five-year annual average (\$41,000).

The analysis indicated Metro has managed employment separations well, on average, to keep the financial impact to the agency relatively low. Because of the sensitive, and in some cases confidential, nature of separation agreement provisions, we did not seek to determine how settlement amounts were reached. The trend analysis compared to the benchmark amounts indicated Metro had made sound financial decisions, on average, to limit costs that can rise rapidly through additional legal proceedings.

Recommendations

To increase transparency and clarify approval authority for employment agreements, Metro Council should:

1. Amend Metro Code to remove the COO's delegation authority for groups of director level positions.

To reduce financial and compliance risks, the COO or their designee should:

2. Specify in approval resolutions, or delegation resolutions, if the approval was one-time or for future employees in the same position.
3. Specify in approval resolutions, or delegation resolutions, if approval has been delegated for subsequent amendments.
4. Analyze separation amounts periodically and compare them to appropriate benchmarks.

To reduce compliance risks, OMA should:

5. Create and utilize a consistent process to review employment agreements and separation agreements for compliance with Metro Code and related delegated authority approvals.

Scope and methodology

The objective of this audit was to determine if controls were in place to ensure compliance with Metro Code requirements related to employment and separation agreements. The scope of the review for employment agreements was January 6, 2003, the date Metro switched to the Council President structure, through October 2019. The change to the Council President structure changed the relationship between the legislative branch (Council) and the executive branch (originally led by the Executive Officer). The scope of the review of separation agreements was July 1, 2014 to June 30, 2019.

To achieve the audit objective, we reviewed employment agreements and separation agreements to determine how they were approved. We then compared the results to the requirements outlined in Metro Code 2.02.010 (Personnel). We researched the causes for those misalignments by talking with the COO and Office of Metro Attorney.

We also obtained and compared Metro's data to jury award and settlement agreement data from Thompson Reuters. We used the settlement probability range and median settlement amounts in our analysis. The publisher of the data noted that the size of the sample from which their settlement figures are drawn is difficult to gauge. While some caution is warranted, we believe it represents the best available data to evaluate Metro's separation amounts.

The audit was included in the FY 2019-20 audit schedule. We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Management response



Memo

Date: Friday, January 17, 2020
To: Brian Evans, Metro Auditor
From: Andrew Scott, Interim Chief Operating Officer
Subject: Employment Agreements Audit Response

Thank you for your recent audit of Metro's employment agreements. Below you will find a written response to each of the five recommendations. Overall, management agrees that Metro should be clear and transparent with regards to the approval authority for employment agreements. And we were pleased to find that Metro's separation payments were consistent with benchmark amounts.

In 2014 Council approved a code change that gives the COO authority to approve employment agreements in some situations. This practice allows flexibility when negotiating employment terms for executive positions at Metro. In 2017 Council passed a resolution delegating authority to the COO to approve employment agreements for department directors, further enhancing the COO's flexibility to hire directors without having to return to Council for a separate resolution or approval of each employment agreement.

The 2014 code change provides that for a group of director-level employment agreements, all terms of the employment agreement needed to be identical except for salary. However, the 2017 Council resolution also included a template with blanks for both salary and other forms of compensation (e.g., vacation accrual), and provided that the terms be substantially similar rather than identical. As a result, management interpreted that authority had been delegated for salary and other compensation. Management agrees with the Auditor that we should seek additional clarity from Council on this point.

Similarly, when Council delegated authority to approve employment agreements for department directors, management interpreted this to include the Deputy Chief Operating Officer and General Manager of Visitor Venues. We agree with the Auditor that we should seek additional clarity on this point as well.

While we agree with the need to clarify the extent and scope of the delegated authority, management disagrees with the Auditor's recommendation to remove the COO's authority to approve employment agreements. The COO is responsible for managing Metro operations, which includes hiring senior executives to lead the organization. Once Council has established the parameters for employment agreements, management believes the COO should have the flexibility to operate within those parameters without having to return to Council for each individual position. The COO should seek Council approval only if a particular negotiation requires provisions outside those authorized by Council.

As a result, we will recommend to Council that they delegate authority to the COO to approve all employment agreements for director-level positions and above, and any subsequent amendments, while at the same time clarifying the parameters for those employment agreements.

Once again, we want to thank the Auditor for diving into this issue and providing us with an opportunity to clarify the code and have a conversation with Council.

Recommendation 1: To increase transparency and clarify approval authority for employment agreements, Metro Council should amend Metro Code to remove the COO's delegation authority for groups of Director level positions.

- **Response:** This recommendation is directed to the Metro Council. As discussed above, management disagrees with the recommendation and will seek additional guidance from Metro Council.

Recommendation 2: To reduce financial and compliance risks, the COO or their designee should specify in approval resolutions, or delegation resolutions, if the approval was one-time or for future employees in the same position.

- **Response:** Management agrees with the recommendation -
- **Proposed plan:** We will discuss with Council their preferred level of delegation and will specify that in future code changes and resolutions. -
- **Timeline:** February 2020

Recommendation 3: To reduce financial and compliance risks, the COO or their designee should specify in approval resolutions, or delegation resolutions, if approval has been delegated for subsequent amendments.

- **Response:** Management agrees with the recommendation -
- **Proposed plan:** We will discuss with Council their preferred level of delegation for subsequent amendments and will specify that in future code changes and resolutions. -
- **Timeline:** February 2020

Recommendation 4: To reduce financial and compliance risks, the COO or their designee should analyze separation amounts periodically and compare them to appropriate benchmarks.

- **Response:** Management agrees with the recommendation -
- **Proposed plan:** HR will analyze separation amounts on an annual basis and compare them to benchmarks. -
- **Timeline:** Beginning in 2021

Recommendation 5: To reduce compliance risks, OMA should create and utilize a consistent process to review employment agreements and separation agreements for compliance with Metro Code and related delegated authority approvals.

- **Response:** The Office of Metro Attorney provides review and advice to the Chief Operating Officer for employment agreements and separation agreements, and amendments thereto. OMA review and advice includes compliance with Metro Code, Metro policy, and employment law. Both the COO and OMA agree with the recommendation, which reflects OMA's role and current practice.