



Certificated layoffs

As a result of the state's dire budget situation, many school districts and county offices of education¹ may again need to consider the unwelcome prospect of staff layoffs for the 2010-11 fiscal year. This advisory focuses on certificated staff layoffs.²

Unfortunately, the information in this advisory may not be new to many districts that were forced to make the difficult decision to lay off staff last year. Districts that have already made certificated staff layoffs and are contemplating additional layoffs for 2010-11, should use this advisory as a "refresher" and ensure that the procedures used this year are consistent with prior years' efforts.

This document is not intended as legal advice, and it is strongly recommended that districts and COEs considering certificated staff layoffs consult with legal counsel immediately. The legal issues surrounding layoffs are incredibly complex, and each district and COE will have unique circumstances due to questions about seniority lists, employee classification, services to be reduced or eliminated, and "bumping" rights. Legal counsel should be consulted in order to ensure that district, COE and employee rights are protected.

Governor's proposed budget

In his proposal for the 2010-11 state budget, Gov. Arnold Schwarzenegger suggested amending the Education Code to move the March 15 notice of layoff for certificated employees to 60 days after the adoption of the state budget. He also proposes to eliminate the legal requirement in Education Code section 44956 that laid-off teachers receive first priority for substitute teaching assignments and that they be paid at their per diem rate.

However, these proposals are a long way from becoming law, and any amendments will need to work their way through the legislative budget process. Because it is very unlikely that any amendments will be finalized before March 15, 2010, districts and COEs must begin planning for 2010-11 layoffs **now** and operate under the current statutory deadlines.

August layoff window

For the first time in 15 years, the so-called "August layoff" window was open in 2009. Pursuant to Education Code section 44955.5, "between five days after the enactment of the state budget and August 15 of the fiscal year to which that budget act applies" the board may terminate permanent and probationary certificated employees, including employees in positions requiring an administrative or supervisory credential, if (1) the board determines that its total revenue limit per ADA has not increased by at least 2 percent over the prior year **and** (2) the board is of the opinion the layoffs are necessary.

It is likely that one of the necessary conditions will be satisfied in that the revenue limit will not increase by 2 percent this year. However, there is no way to predict if the state budget

¹ Pursuant to Education Code section 1294, the county superintendent of schools is the employer. Thus, references in this document to the COE refer to the county superintendent. Section 1294 also states that the layoff provisions for school districts apply to county offices, except that there is no role for the county board of education.

² The process for classified staff layoffs is not as deadline-driven.

will be adopted by the Legislature in time for the procedure to be implemented. Given the uncertainty, boards should not rely on the August window and should proceed with the March 15 schedule outlined below. CSBA will provide information as to the status of the August layoff window.

Schedule for certificated layoffs

Districts or COEs that are planning to reduce staff for 2010-11 *due to a reduction in funding which results in the need to reduce or discontinue specific certificated services*³ (commonly known as a “particular kind of service” or “PKS layoff” pursuant to Education Code section 44955) must follow a strict schedule. Because Education Code section 44949 requires that an employee selected for possible layoff at the end of the school year be given written notice no later than March 15, districts and COEs must begin preparing for layoffs immediately.

JANUARY/FEBRUARY

- **Prepare the seniority list:**

One of the first steps in the layoff process is to determine seniority. In order to help ensure that a district's or COE's records are accurate, many attorneys recommend that districts and COEs mail employees a letter asking them to verify their credentials and seniority date. Employees should be given a specified date (e.g., 10 calendar days) by which they should respond and notify the district or COE of any errors or corrections. The district and COE should consider mailing these letters via certified mail, return receipt requested.

- **Employee classification**

The proper classification of employees is a crucial component of an accurate seniority list; however, the many different types of employees authorized by the Education Code can complicate the situation for districts and COEs. Whether an employee is accurately classified as temporary, probationary, permanent, intern, part-time or an emergency credential holder may affect the validity of the layoff, so legal counsel should be consulted.⁴

- **Probationary employees**

Although the Education Code permits districts and COEs to non-reelect probationary employees without cause, when the decision is economic rather than performance-based the district or COE must use the same layoff process as is used for permanent employees.

- **Emergency and intern credential holders**

In 2007, two appellate courts held that teachers with “provisional credentials,” such as emergency and intern certificates, must be classified as probationary employees for layoff purposes.⁵ Thus, such employees must receive the same

³Note also that authority exists in the Education Code to lay off employees due to a reduction in average daily attendance; however, most attorneys recommend that a district proceed using a PKS layoff.

⁴ In Kavanaugh v. West Sonoma County Union HSD (2003) 29 Cal.4th 911, the California Supreme Court held that a certificated teacher who did not receive written notice of her status as a temporary employee until she had been working in the classroom more than two weeks must be considered a probationary employee. This case underscores the importance of ensuring that employees are properly classified and receive notice appropriate to that classification.

⁵ Bakersfield Elementary Teachers Association v. Bakersfield City School District (2006) 145 Cal.App.4th 1260 and California Teachers Association v. Vallejo City Unified School District (2007) 149 Cal.App. 4th 135. In both cases, teachers with provisional (i.e., emergency or intern) credentials had been classified as temporary employees and thus, instead of receiving

layoff protections as probationary employees with full credentials, including March 15 notice, hearing, and re-employment rights. Districts or COEs may however, take qualifications into account when determining standards for competency, as discussed below.

FEBRUARY

- **Superintendent recommendation**
The superintendent should decide in early February whether to recommend a layoff to the board.
- **Adopt criteria and standards**
The superintendent should develop and the board should adopt:
 - **Criteria for breaking ties**
Criteria are necessary to determine how ties in seniority will be broken for employees with the same employment date.
 - **Standards for determining competency**
Competency standards should be developed by the superintendent in order to accommodate district or COE needs based on the competency of an employee to provide specific service in order to allow other considerations beyond seniority.
- **Reserve a date at the state Office of Administrative Hearings**
Employees have the right to request a hearing before an administrative law judge (ALJ) to determine if there is cause for not re-employing the noticed employee. Because a decision must be sent to districts or COEs by May 7, it's important that districts or COEs considering a layoff reserve a hearing date for April.

BEFORE MARCH 15

- **Board resolution**
The district board must adopt a resolution stating that services are to be reduced and/or discontinued and that it is necessary to reduce the staff, and specifying the extent of the reduction. The resolution must also direct the superintendent to notify affected employees.
- **Written notice to employees**
The superintendent or designee must send notice of the proposed layoff to each affected employee no later than March 15. The notice must advise the employee that the superintendent has recommended to the board that the employee be notified that his or her services will not be required for the following year, the reasons for the recommendation, and the employee's right to request a hearing to determine whether there is cause for the action. The notices must be delivered personally or mailed by certified mail, return receipt requested. See Education Code section 44949 for further details concerning the content of the notice.
 - **Providing notice**
Districts and COEs should consult with legal counsel and examine how the district or COE maintains evidence of receipt of the notice by the employee. Such evidence might include a signed and dated certified mail receipt, a signed and dated receipt in the employee's file, or some other means of establishing personal service.⁶ In 2007, an appellate court held that a probationary employee

the March 15 notice of layoff, they received the notice provided to temporary employees of non-reemployment by the end of the school year.

⁶ In *Hoschler v. Sacramento City Unified School District* (2007) 149 Cal.App.4th 258, a court held that a district's notice of non-re-election was not timely since the district could not prove that the employee had actual knowledge before the statutory deadline. The district had sent

must have actual personal knowledge of a notice of non-reelection before the statutory deadline. Although that case did not apply to layoff notices, districts and COEs should review notice procedures for legal compliance and to ensure that procedures are in place to maintain evidence of how employees were provided notice.

- **Who should receive the notice**

Some districts and COEs, out of an abundance of caution, send notices to staff in excess of anticipated staff reduction. However, such a notification may cause a morale problem and may also cause problems with the union. The decision as to which staff should receive notice should be made in consultation with legal counsel.

OTHER IMPORTANT DATES

- **On or before May 7**

Proposed decision of the administrative law judge must be delivered to the board or county superintendent. A copy of the proposed decision must be sent to all affected employees.

- **Before May 15**

The board must adopt a final decision regarding laying off employees effective by the end of the school year.

The district or COE must send each affected employee a final notice of layoff along with information regarding application for unemployment benefits.

Rights of laid-off certificated employees

Because of the many layoffs that occurred in 2009-10, it is important to remember that laid-off employees retain many rights, including the right to reemployment and substitute service. A permanent certificated employee who has been laid off has a preferred right to reappointment for 39 months as well as the opportunity to substitute for current employees who are temporarily absent from duty or on a leave of absence. If laid-off teachers substitute for more than 20 days within a 60-day school period, they are entitled to their per-diem rate of pay retroactive to their first day of substitute service.

Probationary employees who have been laid off have a preferred right of reappointment for 24 months and the right to substitute service, but not the right to per diem pay.

A note of caution

All of the deadlines and contents of the employee notices are mandatory and must be followed precisely. Again, it is **strongly** recommended that district boards and COEs secure competent legal counsel to guide them throughout this process.

Resources

CSBA's budget resources:

<http://www.csba.org/LegislationAndLegal/Legislation/LegislativeNews/2009.aspx>

CSBA's Education Legal Alliance legal updates:

<http://www.csba.org/LegislationAndLegal/Legal/ELAUpdates.aspx>

If you have any questions about this document, please contact Richard L. Hamilton at CSBA's Educational Legal Alliance at 800-266-3382 or dhamilton@csba.org.

notice via certified mail, return receipt requested, to the employee's post office box, but the employee did not actually receive the notice until six weeks later.