



# LAW UPDATE

## LABOR AND EMPLOYMENT

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### UNDER 250 ADA TERMINATION/LAYOFFS

As you may know, the certificated termination process is remarkably different for smaller districts with under 250 ADA (that have not previously conferred permanency or “tenure” upon its teachers). Unlike larger districts, those with less than 250 ADA and non-permanent teachers may release an employee from service for the following year, for cause, in a fairly streamlined process. However, some strict deadlines apply. Here are some basics you should know, and note on your calendar:

#### **Under 250 ADA Districts (Without Permanency) Cannot Implement Simple Non-reelections of “Probationary” Teachers.**

Districts with less than 250 ADA cannot utilize the general non-reelection process. (The non-reelection process within the Education Code allows a larger district to notify a probationary teacher on or before March 15<sup>th</sup> of their second probationary year that they will not be employed the following school year. The employee does not receive a hearing and is summarily discharged without the district having to provide a stated reason, or “cause.”) Under 250 ADA districts must terminate employment “for cause.”

#### **Smaller Districts with Less Than 250 ADA May Release Non-permanent Certificated Employees for Cause by Following the Proper Pre-March 15<sup>th</sup> Release Provisions.**

Preferred Practice: December 15<sup>th</sup> – Notice of Unsatisfactory Performance. In large districts, an employee may not be terminated for unsatisfactory performance without first receiving a Notice of Unsatisfactory Performance ninety (90) days before filing charges for termination with the Board of Trustees. (Education Code section 44938.) Although this step is not required by law for districts with less than 250 ADA, it is good employment practice nonetheless. The Notice of Unsatisfactory Performance must specify to the employee, in writing, the nature of their performance deficiencies with sufficient particularity so as to furnish the employee with enough time to correct their behavior. The Notice of Unsatisfactory Performance shall include a copy of the employee’s most recent written (unsatisfactory) performance evaluation.

Accordingly, it is best practice to evaluate an underperforming employee and issue them an unsatisfactory performance evaluation and a Notice of Unsatisfactory Performance before December 15<sup>th</sup>.

Again, although the step of issuing a Notice of Unsatisfactory Performance to a non-permanent certificated employee in a district with less than 250 ADA is not required by law, it is a sound employment practice and should be implemented whenever possible. The Notice of Unsatisfactory Performance gives the employee the opportunity to correct their behavior and work performance, hopefully resulting in a better learning environment for students for the duration of the school year and/or puts the employee on notice that they may not be employed as of June 30. Failure to issue a Notice of Unsatisfactory Performance document to a non-permanent certificated employee in an under 250 ADA district will not negate the opportunity to release them from service before March 15<sup>th</sup>, but it is a preferred practice.

Regarding Notices of Unsatisfactory Performance. These documents are issued pursuant to Education Code section 44938 and have specific language and documentation requirements. Please contact Schools Legal Service if you plan to issue any Notices of Unsatisfactory Performance.

March 15<sup>th</sup> - Notice of Non-reemployment for Cause (Not a Layoff). For districts with less than 250 ADA and non-permanent teachers, the procedure for dismissing a certificated employee for cause (unsatisfactory performance, unprofessional conduct, etc.) is located at Section 44948.5 in the Education Code. Please carefully review this code section. However, a very brief summary of the procedure is as follows:

No later than March 15<sup>th</sup>, the superintendent (or designee) shall provide the employee with a written notice that the superintendent shall recommend to the Board of Trustees that the employee's services will not be required for the following school year (the employee will not be recommended for continued employment) for listed specified reasons. Upon receipt of that notice, the employee may request a hearing to determine if there is cause for not re-employing him or her for the ensuing year. If the employee requests a hearing, it shall be performed before an administrative law judge. The judge will provide the Board with a non-binding recommendation/decision by May 7<sup>th</sup>. The Board must then issue the employee a final notice of its final disposition on the matter before May 15<sup>th</sup>. If the Board elects to terminate the employee's employment, it is effective June 30<sup>th</sup>. (See Ed. Code § 44948.5 for the detailed procedure, discovery issues, notices, etc.)

Accordingly, it is important to be mindful of the above-referenced dates, especially in light of your regularly scheduled Board meeting dates. Additionally, given the detail required in many of the documents, it is best to confer with Schools Legal Service as soon as possible if you plan on, or are considering, releasing a teacher from employment. Here are some dates to note on your calendar:

February or earlier. It is best practice to advise your Board in advance that you may be recommending that a certificated employee not be re-employed. Therefore, this discussion should

occur during your February Board meeting or earlier. Please contact Schools Legal Service for the appropriate Board meeting agenda language.

March 1<sup>st</sup> or earlier. If you choose to notify an employee that you will be recommending their termination for cause, please contact Schools Legal Service as soon as possible for assistance with the written notices and associated documents, as the Education Code requires certain language and information be provided to the employee.

March 15<sup>th</sup> or earlier. The employee must receive notice that the superintendent shall recommend to the Board of Trustees that the employee's services will not be required for the following school year for listed specified reasons. Failure to serve an employee with this notice on or before March 15<sup>th</sup> will result in the district's inability to terminate the employee until March 15<sup>th</sup> of the following school year. Note that after an employee receives the March 15<sup>th</sup> notice, should they choose to challenge the dismissal, specific notice and discovery requirements must be met, and a hearing appropriately scheduled with an administrative law judge. The sooner you contact Schools Legal Service, the better.

May 15<sup>th</sup> or earlier. Employee must receive a final notice regarding the disposition of their employment (whether or not the employee requested a hearing) on or before May 15<sup>th</sup>. Please contact Schools Legal Service well in advance of this date for assistance with the final notice documents.

### **Layoffs or Reductions of Particular Kinds of Services – Reductions in Force.**

With respect to certificated layoffs, the process to layoff certificated employees in an under 250 ADA district is almost identical to the process for larger districts. Accordingly, please plan to attend the Schools Legal Service Certificated Layoffs Workshop on November 7, 2013, for more information on the process and to receive a copy of our materials and workbook.

### **Unlawful Termination Claims and Employee Documentation.**

All employers, including school districts, are subject to potential claims of unlawful termination based upon discrimination, retaliation, and/or harassment under California law. Although the Education Code provides smaller districts with a streamlined process for terminating teachers, it does not insulate districts from possible wrongful termination claims. Therefore, always remember that the documentation you generate regarding an employee should evidence a legitimate, non-discriminatory business purpose for terminating their employment. The more documentation you generate that evidences the legitimate "for cause" reasons for an employee's release from service, the better position your district will be in when defending a claim. These documents may include detailed performance evaluations, written warnings/reprimands, written complaints and/or investigations into misconduct. For assistance with generating employment documentation, please contact Schools Legal Service.

If you have any questions concerning this or related issues, do not hesitate to contact our office.

— Tenielle E. Cooper

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