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LEGAL UPDATE

November 17, 2021

To: Superintendents, Member School Districts (K-12)
From: Carl D. Corbin *CDC*
General Counsel
Subject: **AB 438 - Significant Changes in Classified Layoff Process**
Memo No. 38-2021

On October 8, 2021, the Governor approved Assembly Bill (“AB”) 438.¹ Effective January 1, 2022, Education Code section 45117 is amended to treat layoffs of permanent classified employees through essentially the same process that has long been used for layoffs of certificated employees.² Our office will be conducting a workshop (“Layoffs 101”) on January 12, 2022, that will discuss the layoff and probationary non-reelection process for certificated employees and will also cover the new layoff process for classified employees. Our office will also be updating our “layoff packets” (which include instructions and model templates) to assist our clients in effectuating the new layoff process for classified employees.

Below, key points in AB 438 will be discussed along with a summary of the new classified layoff process. Also, in addition to updating relevant Board Policies and Administrative Regulations, we anticipate that our clients will also need to review any applicable Collective Bargaining Agreement (“CBA”) and will very likely need to negotiate revisions to the layoff procedures with their classified labor partner.

Key Points

- The new layoff process does not apply to “short-term” employees who are hired for a period not exceeding 60 days after which the short-term service may not be extended or renewed.³ The new layoff process also does not apply to substitute employees.⁴

¹ Available at: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB438.

² In addition, as per Education Code § 45117(h), if certificated employees are granted any additional rights associated with layoffs then classified employees will also be granted those same rights.

³ Education Code § 45117(f)(2). All subsequent references are to the Education Code.

⁴ §§ 45103(b)(1), (d)(1).

- The new layoff process does not apply to classified positions that are eliminated as a result of the expiration of a “specially funded position.”⁵ In this situation the classified employee is only entitled to 60 days’ notice, which includes notice of any displacement (“bumping”) rights to another position.
- The new layoff process applies to any “permanent” classified employee, defined as “an employee who was permanent at the time the notice or right to a hearing was required and an employee who became permanent after the date of the required notice.”⁶
- If a classified employee is not provided a timely layoff notice and a right to a hearing, then the employee will be deemed rehired for the next school year.⁷
- However, employers do retain the right to release probationary employees without a layoff notice or right to a hearing.⁸

Summary of Layoff Process

- Layoffs are authorized by the governing board of the school district due to a “lack of work or lack of funds.”⁹ This is the same legal standard that has been historically used for classified layoffs.¹⁰
- No later than March 15, “the governing board of the school district and the employee shall be given written notice by the superintendent of the school district or the superintendent’s designee, or, in the case of a school district that has no superintendent, by the clerk or secretary of the governing board of the school district, that it has been recommended that the notice be given to the employee, stating the reasons that the employee’s services will not be required for the ensuing year, and informing the employee of the employee’s displacement rights, if any, and reemployment rights.”¹¹
- The notice must be delivered to the employee in person or via registered mail to the last known address of the employee.¹²
- The notice must inform the employee of the right to request a hearing to determine if there is cause for not reemploying the employee for the subsequent school year. Cause for a layoff includes the employer complying with all Education Code seniority requirements including those in Section 45308.¹³
- The request for a hearing must be made by the employee on or before a date selected by the employer, but must allow at least seven days after the notice is served on the employee.¹⁴
- Upon an employee requesting a hearing, the employer must serve on the employee a District Statement of Reduction in Force after which the employee has five days after service to file a Notice of Participation in Reduction in Force Hearing.¹⁵

⁵ § 45117(g).

⁶ § 45117(e)(2).

⁷ § 45117(e)(1).

⁸ *Id.* Specifically, if “a permanent classified employee is not given the notices and a right to a hearing as provided for in this section, the employee shall be deemed reemployed for the ensuing school year, except that nothing in this section shall be construed to interfere with the right of a district to release probationary employees who never become permanent without notice or hearing.”

⁹ § 45117(a)(1).

¹⁰ § 45308(a).

¹¹ *Id.*

¹² § 45117(c)(3)(A).

¹³ §§ 45117(b), (c)(3)(B).

¹⁴ § 45117(b).



- Any request for discovery must be made within 15 days after the District Statement of Reduction in Force is served on the employee by the employer.¹⁶
- The hearing will be conducted by an Administrative Law Judge (“ALJ”) from the Office of Administrative Hearings (“OAH”) and a proposed decision will be issued; however, the governing board will make the final decision as whether to proceed with the layoff.¹⁷
- Copies of the ALJ’s proposed decision must be submitted by the ALJ to the governing board and the employee on or before May 7.¹⁸
- The final decision of the governing board on whether to proceed with the layoff must be made and a copy of the decision provided to the employee on or before May 14.¹⁹
- All costs associated with the layoff hearing process, including the costs of the ALJ, are paid by the employer.²⁰

In closing, AB 438 represents a significant shift in the process to lay off permanent classified employees and employers will have to prepare to navigate this new process and some of the associated unanswered questions²¹ and challenges.²²

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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¹⁵ § 45117(c)(1).

¹⁶ § 45117(c)(2).

¹⁷ § 45117(c)(3)(A).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ There is an open question regarding two classified employees with the same date of hire and the tie-breaking process. The certificated layoff process (§ 44955) provides explicit authority to resolve certificated tie-breaking, but there does not appear to be a similar classified statute on point. The tie-breaking issue will need to be resolved through the bargaining process and/or through the adoption of a policy. There is also no provision for classified layoff “skipping” like there is for certificated layoffs (§ 44955(d)).

²² OAH will have to address how to “scale up” to handle all of the classified layoff hearings that are in addition to the certificated layoff hearings.