



SCHOOL & COLLEGE LEGAL SERVICES OF CALIFORNIA

*A Joint Powers Authority
serving school and
college districts
throughout the state.*

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MEMORANDUM

To: Mary Downey, Deputy Superintendent, Business Services
Sonoma County Office of Education

From: Loren W. Soukup, Senior Associate General Counsel

Date: March 29, 2018

Re: Applicability of the California Labor Code and Charter Schools

You have asked our office to provide you with a legal response the FCMAT Fiscal Alert: Charter Schools and the Applicability of the California Labor Code, issued on March 1, 2018, enclosed. Based on our research and review of the FCMAT Fiscal Alert, we are in agreement with FCMAT's conclusions for the following reasons:

First, we are in agreement that school districts, and arguably dependent charter schools, are "municipal corporations" for purposes of certain Labor Code exemptions. As such, school districts and dependent charter schools are not subject to Labor Code sections 200 to 211 and 215 to 219, which include the requirement to pay wages to a dismissed employee within 72 hours of discharge, late payment penalties, and provisions requiring payment at least twice monthly for most employees.

Second, we are in agreement that while certificated employees of independent charter schools are exempt from Labor Code section 204 and thus can be paid on a monthly basis, non-certificated employees, including non-certificated administration or other professionals, do not fall within this same exemption. As such, we concur with FCMAT that all independent charter school non-certificated personnel should be paid twice a month, on the 15th and the last days of the month, in compliance with Labor Code section 204. In light of this opinion, independent charter schools may choose to pay all certificated and non-certificated employees twice per month to simplify the payroll process.

Please let me know if you have any questions concerning this or any other matter.

Charter Schools and the Applicability of the California Labor Code

This Fiscal Alert addresses whether the California Labor Code applies to charter school employees. The question was raised after the October 2017 legal opinion of Hansberger & Klein (H&K), PLC, was shared with the External Services Subcommittee of the Business and Administration Steering Committee. H&K's information relates to the impact of the March 2017 opinion in *Gateway Community Charter School v. Heidi Spiess* (9 Cal. App. 5 499) by the Third District Court of Appeals. FCMAT is providing this Alert in response to questions from county offices and others. It should be considered as analysis, not as legal advice.

The application of the Labor Code to the public education system is not always clear; the Education Code is also inconsistent with the Labor Code. Although FCMAT cannot resolve these differences and inconsistencies, this Alert will address those provisions concerning the question at hand on whether twice-monthly payroll payments are required for charter schools.

Although the terms independent and dependent are not defined in the Charter Schools Act, they are often used to describe the relationship between an authorizing district and a charter school. FCMAT will refer to independent charter schools in this Fiscal Alert as those that are separate from the authorizer. Dependent charter school employees are considered employees of the authorizing entity and are usually conversion schools, subject to the same rules as other district employees.

Public employers are not subject to the Labor Code unless a Labor Code provision expressly makes a public agency subject to its provisions. Labor Code Section 204 expressly exempts certain employees from specified Labor Code sections, including employees that are "executive, administrative, and professional employees ..." (Labor Code Section 204(a)).

Labor Code Section 220 establishes the exemption of various public agencies from specified sections of the Labor Code, including the section involved in the Gateway matter. Section 220 reads:

(a) Sections 201.3, 201.5, 201.7, 203.1, 203.5, 204, 204(a), 204(b), 204(c), 204.1, 205, and 205.5 do not apply to the payment of wages of employees directly employed by the State of California. Except as provided in subdivision (b), all other employment is subject to these provisions.

FCMAT

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(b) Sections 200 to 211, inclusive, and Sections 215 to 219, inclusive, do not apply to the payment of wages of employees directly employed by any county, incorporated city, or town or other municipal corporation. All other employments ... are subject to these provisions.

The listed sections include the obligation to pay wages to a dismissed employee within 72 hours of discharge, late payment penalties, and provisions requiring payment at least twice monthly for most employees, including payment by the 26th of the month for the entire balance of the month. Section 220 exempts municipal corporations from application of those rules; school districts are municipal corporations. (See *Division of Labor Law Enforcement v. El Camino Hosp. Dist.* (1970) 8 Cal. App. 3d Supp. 30; *Kistler v. Redwoods Community College Dist.* (1993) 15 Cal. App. 4th 1326, 1336-1337.)

Accordingly, Gateway was primarily a determination of whether or not a public benefit corporation that operated charter schools was a municipal corporation and therefore exempt from the late payment penalties of Section 203. The court determined the charter school was not a municipal corporation and not exempt from the Labor Code sections enumerated in Section 220, and therefore was subject to Section 203. The H&K opinion letter correctly indicates Section 204(a), the obligation to pay at least twice monthly, applies to nonexempt charter school employees. It does not apply to exempt employees of charter schools because 204(a) includes language exempting executive, administrative, and professional personnel, saying:

However, salaries of executive, administrative, and professional employees of employers covered by the Fair Labor Standards Act, as set forth pursuant to Section 13(a)(1) of the Fair Labor Standards Act, as amended through March 1, 1969, in Part 541 of Title 29 of the Code of Federal Regulations, as that part now reads or may be amended to read at any time hereafter, may be paid once a month on or before the 26th day of the month during which the labor was performed if the entire month's salaries, including the unearned portion between the date of payment and the last day of the month, are paid at that time. (For purposes of this letter, FCMAT assumes these executive employees are subject to the FLSA, but does not validate or verify that assumption as part of this specific analysis.)

Education Code Section 45038 also governs when charter school employees are paid. That section reads:

- a. The governing board of a school district or charter school may arrange to pay the persons in positions requiring certification qualifications employed by it, or any one or more of those employees or one or more groups or categories of those employees, in either 10, 11, or 12 equal payments instead of by the school month.
- b. In lieu of the arrangement in subdivision (a), orders for the payment of salary, and payroll orders for the payment of salary and warrants for the payment of salary of employees employed in positions requiring certification qualifications may be drawn once each two weeks, twice a month, or once each four weeks as determined by the governing board.

While this seems to indicate a charter school's certificated teachers and other certificated personnel could be paid monthly, that rule may only apply to those teachers and others holding credentials, and likely does not apply to other noncredentialed teachers (those who are permitted by Education Code Section 47605(1) to provide instruction in a charter's noncore, noncollege prep courses).

Education Code Section 45048 permits any monthly payment to a district's certificated employees to be made on the last day of the month. While Section 45048 is in the same article as Section 45038, Section 45048 does not mention charter schools where it mentions school districts as does Section 45038. While it is possible that Section 45048 would be interpreted to include charter schools, it is unlikely.

Classified employees in merit districts should be paid on the last working day of the month, pursuant to Education Code Section 45166. The payment date of nonmerit system classified employees is less clear, and is not addressed in this Alert. These rules do not apply to charter school classified employees. Section 45166 applies to "any public school system," which is an undefined term. However, an interpretation that it applies to the entire state school system, of which charter schools are clearly a part, is unlikely. Given the mega-waiver from application of most Education Code provisions to charter schools, a charter school wishing to test use of this theory would likely have to first make itself expressly subject to this section.

As to when a charter school's nonexempt staff should be paid, Labor Code Section 204(a) provides in pertinent part:

- (a) All wages ... earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer. ... Labor performed between the 1st and 15th days ... shall be paid for between the 16th and the 26th day of the month ... and labor performed between the 16th and the last day ... shall be paid for between the 1st and 10th day of the following month.

While this provides a good deal of flexibility in payment dates for nonexempt staff, it also is fairly ambiguous. Accordingly, Labor Code Section 204(d) also provides:

- (d) The requirements of this section shall be deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if the wages are paid not more than seven calendar days following the close of the payroll period.

Simplistically, this permits the twice-monthly payments to be made to nonexempt personnel on the 15th and last days of the month. Labor Code Section 204 applies to nonexempt employees but not to a charter's exempt employees.

Education Code Section 45039 permits certificated employees of both districts and charter schools to be paid at the end of each month when paid on a 12-month basis. That section reads:

If the governing board of a school district or charter school arranges to pay persons employed by it in 12 equal payments for the year, it may pay each monthly installment at the end of each calendar month, whether or not the persons are actually engaged in teaching during the month.

Conclusion:

A noncertificated charter school teacher can qualify as a professional, and thus be exempt from certain Labor Code provisions, yet still not be included in the Education Code provisions on payments to certificated charter school employees.

Various charter school legal counsel are advising their clients to pay all personnel, both exempt and nonexempt, twice monthly, likely because exemptions of any charter school employees are unclear under the Labor Code, because it is simple and fair to have similar payment schedules for all employees, and because the risks and costs of fighting the Division of Labor Standards Enforcement (DLSE) on these issues are high.

These twice monthly payrolls include payments on the 15th and last days of the month on the theory that, while Section 204(a) requires payment by the 26th, Section 204(d) indicates the requirements of the section are satisfied if the second payment in the month is made not later than the seventh day following the close of the payroll period. Labor Code Section 204(c) also indicates that employees covered by a collective bargaining agreement may be paid per the terms of the agreement. While charter schools seldom have such agreements, those that do may pay per those terms.

Dependent charter schools, as a whole, are exempt from the various provisions of the Labor Code because they are part of the school district. Independent charter schools, as a whole, are not exempt from those same Labor Code provisions because an independent charter school, or nonprofit operating the school, is not a municipal corporation. This leaves various charter school employees subject to or exempt from the Labor Code sections, depending on their status as exempt or nonexempt employees.

It can be argued that an independent charter's certificated employees could be paid the same as district employees but that would not include noncertificated administration or other professionals, and there could still be a dispute with the DLSE over application of the Labor Code to these employees. FCMAT believes this is why charter lawyers are recommending twice-monthly payments to all employees and why independent charters that are not doing so should consider it.

Additional Assistance

FCMAT encourages LEAs to begin and/or continue this discussion with their legal counsel if approached with how often charter school payrolls should be processed.

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New CalPERS School Employer Rates Released

During its meeting on April 17, 2018, the California Public Employees' Retirement Systems (CalPERS) Board approved the employer contribution of 18.062% for 2018-19, which represents a 2.531% increase over the 2017-18 rate of 15.531%.

CalPERS School Employer Contribution Rates		
	Previous Employer Rates	Updated Employer Rates
2018-19	17.7%	18.062%
2019-20	20.0%	20.8%
2020-21	22.7%	23.5%
2021-22	23.7%	24.6%
2022-23	24.3%	25.3%
2023-24	24.8%	25.8%
2024-25	25.1%	26.0%

The increase in the rates is driven primarily by the lowered expected return on investments, as well as the conversion from a 30-year amortization period to a 20-year amortization period.

In addition to the revised employer contribution rate, CalPERS also raised the employee contribution rates for new members from 6.5% to 7.0% effective July 1, 2018. More information can be found in the CalPERS notification by clicking [here](#).

—*Matt Phillips, CPA; and Charlene Quilao*

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The True Cost of Pension Reform

Local educational agencies (LEAs) in the state of California have been grappling with the increasing cost pressures that resulted from the acknowledgement that both the California State Teachers' Retirement System (CalSTRS) and California Public Employees' Retirement System (CalPERS) have significant unfunded liabilities. The Public Employees' Pension Reform Act of 2013 implemented changes in benefits and creditable compensation in an effort to stem increases for new members. However, the unfunded liabilities for current members still placed both plans under significant financial strain.

Employer contribution rates have risen sharply over the last five years and continue to face steep climbs in the future. CalSTRS employer contribution rates are legislatively approved, while CalPERS employer contribution rates are approved each spring by the CalPERS Board. The employer contribution rates are listed in Figure 1.

Figure 1: Effective Employer Contribution Rates		
Year	CalSTRS	CalPERS
2013-14	8.250%	11.442%
2014-15	8.880%	11.771%
2015-16	10.730%	11.847%
2016-17	12.580%	13.888%
2017-18	14.447%	15.531%
2018-19	16.280%	18.062%

Assembly Bill (AB) 1469 (Chapter 47, Statutes of 2014), the CalSTRS full funding plan, was passed on the heels of the Local Control Funding Formula (LCFF), a formula that promised a return of purchasing power to LEAs that was lost during the Great Recession. Now that the LCFF is facing full implementation in the 2018-19 fiscal year, it is a good time to take a look at the financial impact of AB 1469 on an LEA's budget.

Based on exhibits from the California Department of Education's (CDE) website, the commitment to LCFF over its first six years is projected to total nearly \$20 billion as shown in Figure 2.

Figure 2: Implementation of Local Control Funding Formula		
Year	Increase From Prior Year Due to Additional Funding	Cumulative Effect
2013-14	\$2,067,140,000	\$2,067,140,000
2014-15	\$4,721,970,000	\$6,789,110,000
2015-16	\$5,994,417,000	\$12,783,527,000
2016-17	\$2,941,980,000	\$15,725,507,000
2017-18*	\$1,362,383,000	\$17,087,890,000
2018-19*	\$2,900,000,000	\$19,987,890,000
*Estimated based on the CDE principal apportionment exhibit and the Governor's 2018-19 January Budget Proposal		

The increase in employer contribution rates for CalSTRS and CalPERS results in an ongoing commitment of more than \$2 billion annually as shown in Figure 3. The ongoing commitment represents 11.8% of new ongoing LCFF revenues and assumes no salary increases over a six-year period.

Figure 3: Effect of CalSTRS and CalPERS Rate Changes and No Compensation Increases			
Year	Creditable Compensation	Increase From Prior Year Due to Rate Change	Cumulative Effect
2013-14	\$30,545,071,431	-	-
2014-15	\$30,545,071,431	\$170,418,076	\$170,418,076
2015-16	\$30,545,071,431	\$435,329,137	\$605,747,213

2016-17	\$30,545,071,431	\$579,054,027	\$1,184,801,240
2017-18	\$30,545,071,431	\$553,892,577	\$1,738,693,817
2018-19	\$30,545,071,431	\$610,944,581	\$2,349,638,398

Realistically, LEAs have increasing cost pressures on the natural due to step and column increases, as well as pressures from local bargaining units to raise wages for their employees. The combined effect of the increase in creditable compensation and the employer contribution rates represents an ongoing commitment of more than \$2.8 billion annually as shown in Figure 4.

Figure 4: Effect of CalSTRS and CalPERS Rate Changes and Compensation Increases			
Year	Creditable Compensation	Increase From Prior Year Due to Rate Change	Cumulative Effect
2013-14	\$30,545,071,431	-	-
2014-15	\$32,482,423,566	\$181,682,887	\$181,682,887
2015-16	\$34,548,885,729	\$493,289,429	\$674,972,316
2016-17	\$35,995,508,209	\$682,409,210	\$1,357,381,526
2017-18**	\$37,266,149,648	\$675,734,485	\$2,033,116,011
2018-19**	\$38,581,644,731	\$771,802,053	\$2,804,918,065
**Estimated a 1.5% increase for step and column and 2% increase in creditable compensation over previous year's creditable compensation			

The ongoing commitment represents 14% of new ongoing LCFF revenues and equates to approximately \$467 per average daily attendance and will only continue to grow as the employer contribution rates continue to rise. It is estimated that by 2020-21, the cumulative impact of the rate increases will total more than \$4.1 billion.

LEAs were promised restoration in purchasing power when the LCFF was introduced; however, that promise was short-lived as the additional cost pressures, highlighted by AB 1469, were applied as a dollar-for-dollar reduction in new LCFF revenues. While everyone agrees that funding public pensions is fiscally prudent, it must be recognized that the cost of doing so is high and directly impacts the ability of LEAs to provide services for current students.

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Historic LCFF and Special Education Funding Bills Pass Assembly Education Committee

On Wednesday, April 11, 2018, the Assembly Education Committee, chaired by Assembly Member Patrick O'Donnell (D-Long Beach), took action on nearly 40 bills, including two significant educational funding measures: Assembly Bill (AB) 2808 by Assembly Member Al Muratsuchi (D-Torrance) and AB 3136 by Assembly Member O'Donnell.

AB 2808 passed out of the committee on a 5-0 vote with Vice Chair Kevin Kiley (R-Rocklin) abstaining. The bill would increase the Local Control Funding Formula (LCFF) base grant funding targets by nearly 60%. Specifically, the bill changes the base grant targets, commencing in the 2019-20 budget year, from the current levels as follows:

Grade Span	Governor's 2018-19 Proposal	AB 2808	Change	% Change
K-3	\$8,141*	\$13,026*	\$4,885	60%
4-6	\$7,484	\$11,975	\$4,491	60%
7-8	\$7,707	\$12,332	\$4,625	60%
9-12	\$9,163*	\$14,661*	\$5,498	60%

*Note: Includes the class-size reduction (K-3) and college and career readiness (9-12) adjustments

The bill has no registered opposition and is supported by various local educational agencies (LEAs) and public school associations, including the Association of California School Administrators, the California Association of School Business Officials (CASBO), the California School Boards Association (CSBA), the California School Funding Coalition, and the California Teachers Association (CTA).

The goal of the bill is to provide school districts with the resources they need to keep up with growing fixed costs such as employer pension contributions, health and welfare benefits, step and column salary increases, etc. Additionally, the bill would propel California towards the national average in per-pupil spending.

The other major educational funding bill, AB 3136, passed out of the committee on a 6-0 vote. The bill would provide critical funding for California's students with special needs population by making significant changes to the Special Education funding system by:

- Establishing a funding mechanism to support Special Education preschool programs by adding a proxy for preschoolers in the AB 602 funding formula
- Addressing long-standing inequities by equalizing AB 602 rates to the 95th percentile
- Providing a supplemental grant to support students with greater needs, including students who are on the autism spectrum, blind, visually impaired, and/or intellectually disabled
- Allowing the AB 602 funding to utilize a declining enrollment adjustment based on school district average daily attendance (ADA), rather than Special Education Local Plan Area (SELPA) ADA

This bill also has no registered opposition and is sponsored by the Coalition for Adequate Funding for Special Education and CASBO and is supported by numerous SELPAs, LEAs, and associations, including the California State PTA and CTA.

Both AB 2808 and AB 3136 will now head to the Assembly Appropriations Committee where their fiscal implications will be scrutinized. If they are able to pass out of the Appropriations Committee, they will head to the Assembly Floor for a vote before they can go to the Senate. Stay tuned.

—*The SSC Governmental Relations Team*

posted 04/16/2018