

Exit Incentives—Points to Consider

What is an early notice incentive? An *early notice incentive*, also called an *early resignation notice incentive*, is a cash incentive to employees who already intend to resign at the end of the school year in return for early notice of resignation. The Texas Education Code allows educators employed under probationary, term, or continuing contracts to provide notice of resignation, without penalty, at any time up until 45 days before the first day of instruction of the following school year. The “penalty-free resignation date” falls around the middle of July for most districts, but districts begin staff planning for the next school year in the spring. At-will employees may resign at any time. Districts may offer an incentive to employees who agree to provide notice in the spring. A Model Early Resignation Notice Incentive form is attached.

What is an exit incentive? An *exit incentive* is a payment to an employee in return for the employee’s voluntary resignation. Unlike an early notice incentive, the underlying presumption of an exit incentive program is that the employee intended to continue employment with the district. A school district considering an exit incentive should consult with its school attorney about the following issues.

What are the legal issues associated with exit incentive program?

- **Who?** The district should determine which employees will be eligible for the incentive program.
 - **Everyone!** The district may choose to offer the incentive on a district-wide, campus-wide, department-wide, or other basis. The risk of this approach is that the district may lose vital personnel or top performers.
 - **Or just some . . .** Some employers use a two-step process under which employees can volunteer for the program, but the employer reserves the right to reject certain applicants based on business needs. The risk of this approach is that employees who are denied participation, but are later subject to involuntary layoff, may sue the employer for not letting them participate in the exit incentive.
 - **Retirees only?** The district may be tempted to single out employees who are eligible for retirement. Unfortunately, Texas Education Code Section 22.007 prohibits a district from offering a financial or other incentive to an employee to encourage the employee to retire from the Teacher Retirement System of Texas (TRS). Accordingly, a district should not offer an exit incentive only to retiring employees. Offering the incentive to a broader group of employees that includes persons eligible for retirement would not violate the law since the incentive would not be structured to encourage retirement.
 - **Re-retire?** The district may want to single out rehired retirees for exit incentives—essentially as an incentive to retire again. A program that is targeted at employees in the protected age group (age 40 or over) may result in age discrimination claims. A district that sponsors such a program should be prepared to articulate “reasonable factors other than age” to support its actions.

- **How much?** The district should decide how much it is willing to pay to encourage employees to resign.
 - **Gift of public funds?** The Texas Constitution prohibits the grant of extra compensation to a public employee after service has been rendered, or a contract has been entered into and performed in whole or in part. Tex. Const. Art. III, Sec. 53. An exit incentive payment does not violate this restriction if the employee provides consideration for the payment. Tex. Att’y Gen. GA-0165 (2000). For term and continuing contract employees, consideration includes the employee’s surrender of contract rights. For probationary employees at the end of the contract term or at-will employees, the exit incentive must be supported by another form of consideration, such as a release of claims.
 - **Lump sum or payout?** The district should decide whether the incentive will be paid in a lump sum, or paid out over time. Employees generally want any incentive payments to be considered creditable compensation for TRS purposes. TRS takes the position that a lump sum payment is not creditable compensation. If, however, the employee is placed on paid administrative leave for the duration of the incentive payment, the payment will be considered creditable compensation *and* the number of days on administrative leave will be counted toward the number of days required to receive a year of service credit.
 - **Leave reimbursement programs.** Many districts “reimburse” unused leave when an employee resigns or retires. These programs are typically addressed at DEC (LOCAL). Districts should consider whether, and how, such programs will interact with any exit incentive program. Will the employee be able to collect the exit incentive *and* the leave reimbursement? Or will the employee have to forfeit the leave reimbursement if he or she accepts the incentive? Also, districts will want to include the cost of leave reimbursements in their financial projections—some of these programs are fairly generous.
- **Releases:** The district may want a formal, written release from employees who accept a payment under the plan.
 - **Unemployment claims:** It is a criminal offense to require a release of unemployment claims. Tex. Lab. Code §§ 207.072, .074. Just don’t do it.
 - **Discrimination claims:** The Equal Employment Opportunity Commission (EEOC) takes the position that waivers of discrimination claims must be knowing and voluntary. The EEOC has developed a six-factor test for determining the validity of such releases. More information and the EEOC’s sample release are available on-line: www.eeoc.gov/policy/docs/qanda_severance-agreements.html.
 - **Age discrimination claims:** The Older Workers Benefits Protection Act (OWBPA), 29 U.S.C. § 626(f), sets forth the requirements for obtaining an enforceable release of claims under the Age Discrimination in Employment Act. Among other things, an employer that offers an exit incentive program must allow 45 days for the employee to consider the offer, provide workforce statistics (including the ages of all employees eligible for the program), advise the employee to consult an attorney, and allow the employee 7 days to revoke any release of claims. A district should weigh the burden of complying with these requirements against the benefit of obtaining a release of age claims. In some cases, it

may be preferable to forego the onerous requirements of the OWBPA and instead present the employee with a streamlined release document. More information on age releases is available on the EEOC Web Site: www.eeoc.gov/policy/docs/qanda_severance-agreements.html.

- **Unemployment benefits:** The district should factor the potential for unemployment claims into the decision to offer an exit incentive.
 - **Involuntary separation?** As a rule, an employee who voluntarily resigns from employment is not eligible for unemployment benefits. However, an employee who accepts an exit incentive in the face of near-certain involuntary layoff may be able to argue that his or her participation in the program was not a voluntary separation from employment. In such case, the employee may be eligible for unemployment compensation benefits. The maximum benefits payable by a district for a professional employee are \$10,790, although the employee may receive additional benefits under federal or other programs. In other words, if a district terminates 100 employees and each of those employees receives full unemployment benefits, the district's liability for unemployment benefits alone could be over \$1,000,000.

If a district wants to avoid unemployment claims in connection with an exit incentive program, the district should assure employees that "work is still available," if that is in fact true. The Texas Workforce Commission is more likely to find that the employee's participation in the program was a voluntary separation if the employee accepted the incentive while work was available.
 - **Early Notice Incentive:** Before soliciting volunteers for the exit incentive, districts should consider offering an early resignation notice incentive to identify employees who already intend to resign. If the resignation is truly voluntary and work was still available, the employee would not be eligible for unemployment.
- **Other issues:** Depending on the district's local circumstances, an exit incentive program may have other legal implications. Listed below are just a few issues that may arise in your district.
 - **Promises, promises:** The district should be cautious about statements regarding future layoffs and exit programs. The district may be tempted to promise that "there will be no further offers" or that future exit incentives will not be as generous. Promises like these can be fodder for litigation, especially from employees who feel pressured to accept severance payments only to learn that the employer offered a more generous package a few months later.
 - **Health insurance:** The district should consider health insurance costs in deciding when termination under the exit incentive will be effective. An employee whose resignation is effective after the last day of instruction is entitled to continue participation in the district's group health insurance plan through the summer. Tex. Educ. Code 22.004(k). If the termination will be effective in the middle of the school year, the employee will forfeit the right to continue coverage under the district's health insurance plan through the summer. This may be a disincentive to accepting the offer. If, however, the termination will be effective after the last day of instruction, the employee can continue coverage. This may make the program more attractive, but districts should include the cost of summer insurance coverage in their cost projections.

- **H1-B Visa holders:** The district should consider whether it has sponsored any employees for H1-B Visas. If so, the district may have further obligations relating to a visa holder who volunteers for the exit incentive program, including paying the cost of transportation back to the employee's country of origin. The district should review its plan to offer an exit incentive with immigration counsel.

Where can we find more information?

A district with specific concerns about exit incentive programs should work with its attorney. The district can also contact TASB Legal Services at 800-580-5345 for general assistance. Members of the TASB Risk Management Fund's Unemployment Compensation program should contact TASB Risk Management Services at 800-482-7276, ext 6258, with questions regarding unemployment compensation.

This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is not an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. Consult with your own attorneys to apply these legal principles to specific fact situations.

Prepared by Holly Claghorn, Senior Attorney, February 2011

Early Resignation Notice Incentive for the 2010-11 School Year

The Texas Education Code allows educators employed under a probationary, term, or continuing contract to provide notice of resignation, without penalty, at any time up until 45 days before the first day of instruction of the following school year. In order to allow the District additional time to plan staffing for the 2011-12 school year, the District is offering an incentive to identified employees for their early notice of resignation. Only the first ____ employees who timely submit this form and other required documentation are eligible for the incentive.

Eligibility: Only employees who meet both of the following requirements are eligible for the incentive:

- Employees who are employed under probationary, term, or continuing contracts and hold the proper certifications and credentials for their position.
- Employees who were already planning to resign or retire at the end of the school year.

Amount: The employee will receive an incentive payment in the amount of ____% of the employee's base salary (excluding stipends and bonuses), up to a maximum amount of \$_____.

Procedure:

- The employee must **personally** submit to the human resource office a letter of resignation addressed to the Superintendent on or before 5:00 p.m., Friday, February 25, 2011. The employee's resignation must be voluntary, unconditional, and effective on the employee's last duty day of the 2010-11 school year, unless the employee and Superintendent agree to an alternate date.
- The resignation letter must be accompanied by this form, signed by the employee. Eligible employees who have previously submitted notice of resignation are eligible to apply for the incentive if they sign and submit this form by 5:00 p.m., February 25, 2011.

Employee printed name: _____

I have read and agree to abide by the terms set out above for the early resignation notice incentive.

Employee Signature: _____

Date: _____

Received by: _____

Date: _____