



Personnel Issues During School Closings

Each year, many Texas school employees are unable to work when schools are affected by pandemic flu, hurricanes, or other disasters. Pandemics and disasters may affect just a handful of employees, or they may result in school closing. During school closings, many districts wish to continue paying employees their regular wages in order to maintain morale and reduce employee turnover. In addition, districts may wish to pay a premium to employees who work during a disaster, especially if a district continues to pay other employees who are idled. The following FAQs address the legal principles relating to employee absences during a school closing.

Q: Is a district required to pay employees who do not work while the district is closed due to a disaster or pandemic?

A. Maybe. The answer depends on the employee's status under the Fair Labor Standards Act (FLSA)¹ and the amount of time the district is closed.

Nonexempt employees: The FLSA does not require a district to pay nonexempt employees if the district is closed, even if employees would normally be scheduled to work. *Nonexempt employees* include both hourly employees and salaried employees whose duties do not qualify them for exemption from the FLSA's minimum wage and overtime requirements. In school districts, nonexempt employees include bus drivers, cafeteria workers, clerical staff, and instructional aides. Whether the district is closed for part of a day, part of a week, or a full week or more, the law does not require the district to pay these employees for time they do not work.²

Exempt employees: The rules for employees who are exempt from the minimum wage and overtime laws depend on whether the employee is: (a) an educator; or (b) another exempt employee. State law requires districts to employ *educators*³ under contracts that provide for a minimum of 187 days of service. The commissioner may reduce the number of days of service below 187 due to a "calamity," but such a reduction by the commissioner does not reduce an educator's salary.⁴ It is not clear whether a district may reduce the days of service to an amount that is above 187—for example, a three-day reduction in days of service for an employee whose contract specifies 192 days of service. A district who is facing such a situation should consult legal counsel.

¹ The FLSA is the federal law that requires payment of minimum wage and overtime to most employees. Employees who are employed in an administrative, professional, or executive status are exempt from minimum wage and overtime requirements.

² An exception may apply to salaried, nonexempt employee who is paid a fixed salary for a workweek of variable hours. 29 C.F.R. § 778.306.

³ An *educator* is a person who is required to hold a certificate issued by the State Board for Educator Certification. Tex. Educ. Code § 5.001(5). This includes classroom teachers, counselors, librarians, principals, and superintendents.

⁴ Tex. Educ. Code § 21.401.

For exempt employees who are not employed under a contract, such as business managers and transportation directors, the analysis depends on whether the district is closed for a partial or full workweek.⁵ If an exempt employee works any part of a workweek—e.g., if a district is closed for only part of a week—the FLSA mandates that these employees be paid their full salaries.⁶ If a district is closed for a full workweek and an exempt employee performs no work, the FLSA does not require the district to pay the employee.⁷

Q: Is it permissible for a district to pay employees who do not work while the district is closed?

- A. Yes. A district may pay employees even if it is not legally-obligated to pay them, if the district takes steps to avoid an improper use of public funds. Specifically, the board must: (1) determine that the expenditure serves a public purpose; (2) retain sufficient control over the expenditure to ensure that the public purpose is accomplished; and (3) ensure that the district receives a return benefit.⁸ In the case of temporary closings due to weather events or epidemics, some boards have concluded that paying employees for hours not worked increases morale and reduces employee turnover.

If a district chooses to pay idled employees, the board should adopt a resolution or similar action at an open meeting that complies with the Texas Open Meetings Act. The resolution should address, at a minimum: (a) the public purpose served by continuing wage payments; (b) which employees will continue to receive wage payments; (c) whether employees who will be required to work while the school is closed will receive premium payments; and (d) the duration of the payments (which can be revisited if the district is required to remain closed for longer than anticipated). The third factor—premium payments to employees who work while school is closed—may already be addressed in local policy, typically at DEA(LOCAL).

Q: Can a district pay a premium to employees who are required to work while the district is closed?

- A. Yes. A district may pay a premium to employees who work during difficult times. For example, some employers pay hourly employees who work during closures a premium of time and one-half for regular hours. The district should be mindful that premium payments may affect an employee's hourly rate for overtime purposes during the relevant time period.⁹ Districts may also pay a bonus or premium to exempt employees without endangering their exempt status.¹⁰

Because a district is not legally required to pay a premium, the decision should be made in advance and should include the safeguards of public funds described in response to the previous question.

⁵ A *workweek* is a fixed and regularly recurring seven-day period that may or may not coincide with the calendar week. 29 C.F.R. § 778.105. See TASB Policy DEA(LOCAL).

⁶ 29 C.F.R. § 541.602.

⁷ 29 C.F.R. § 541.602.

⁸ Op. Tex. Att'y Gen. GA-76 (2003).

⁹ 29 C.F.R. § 788.108.

¹⁰ 29 C.F.R. § 541.604.

Q: Will the district receive reimbursement from disaster funds for labor costs during school closings?

- A. A district may be eligible for reimbursement of wages paid to employees who worked during a disaster-related closing. Federal Emergency Management Agency (FEMA) policy provides for reimbursement of some labor costs incurred during a disaster covered by a federal disaster declaration. Only labor costs in excess of what the district would have incurred absent the disaster are eligible for reimbursement. Moreover, the district must have had a written policy in place, before the disaster, providing for the payment of these labor costs:

The actual costs of salaries and benefits for individuals sent home or told not to report due to emergency conditions are not eligible for reimbursement. Extraordinary costs for essential employees who are called back to duty during administrative leave to perform disaster-related emergency work are eligible *if the costs were provided for in written policy prior to the disaster.*

www.fema.gov/pdf/government/grant/pa/9525_7.pdf (emphasis added).

In June 2009, TASB Policy Services sent an e-mail to policy administrators regarding sample language for a disaster pay policy. If your district has not adopted such language and wishes to do so, the district's policy administrator should consult its policy consultant for assistance.

Q: If the district schedules makeup days within the original instructional year, can contract employees be required to work the make-up days?

- A. Yes. Contract employees are required to work the schedule described in their contracts and any related documents. As discussed above, state law requires educator contracts to provide for a minimum of 187 days of service.¹¹ The commissioner may reduce the number of days of service if the number of instructional days is reduced. However, the waiver of instructional days is not the same as a waiver of days of service. If a district does not seek a waiver of the required days of service, the district may require contract employees to work the schedules under their contracts, including any make-up days.

Q: If the district is forced to modify its instructional calendar, can we require contract employees to work beyond their original end date without additional compensation?

- A. Maybe. Contract employees are also protected by the work schedule described in their contracts and any related documents. For example, the Commissioner of Education has held that a teacher cannot be required to work after the last duty day specified in the work schedule distributed before the penalty-free resignation date.¹² Thus, the district must first determine what schedule the teacher agreed to work.

¹¹ Tex. Educ. Code § 21.401.

¹² *Kelley v. North East Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 026-R10-1101 (Jan. 3, 2006).

The TASB model contracts provide for the possibility that a calamity may force the district to shift work schedules:

1. **Term.** You will be employed on a _____-month basis for the 20__-20__ school year(s), according to the start and end dates set by the District. The District will provide you with your start and end dates by the penalty-free resignation date (see Tex. Educ. Code § 21.210). If your contract is for more than one school year, the District will provide your start and end dates for each school year by the penalty-free resignation date for that school year. *The District may extend the end date in a school year to the extent the District adjusts the instructional schedule due to a school closing required by disaster, flood, extreme weather conditions, fuel curtailment, epidemic, pandemic, or other calamity.*

(Emphasis added.) Thus, a district that uses language similar to that in the TASB model contracts could extend the teacher's end date by the same number of days that the district was required to adjust the instructional year. In any event, a district should consult its school attorney before adjusting its instructional year beyond the original last day of work for instructional staff.

Q: If the district is forced to modify its instructional calendar, can we require noncontract employees to work beyond their original end date without additional compensation?

- A. Probably not. Some districts continue wages payments to hourly employees during school closings. These districts may be tempted to treat such payments as an advance against any additional days of work required by the closing. However, the Texas Constitution prohibits governmental entities from advancing wages.¹³ Accordingly, a district should not treat wage payments to nonexempt staff during idle periods as advances against possible future services. In addition, the FLSA requires that nonexempt employees receive at least minimum wage for all hours worked and, where applicable, overtime pay. Thus, nonexempt employees who work further into the summer must be paid for their time.

Q. Do wage payments to contract employees during a school closing constitute an impermissible advance of wages?

- A. Probably not. Most districts pay salaried employees who work a ten- or eleven-month schedule on an *annualized* basis—the salary is spread over twelve months. At any given time during the school year, these employees have earned more than the district has paid them. By the end of April, these employees have typically been paid 3/4ths of their salaries, with the remainder to be paid out over May, June, and July. Thus, continuing payments to these employees is not an advance of wages. Moreover, the Attorney General has concluded that a public employer may pay employees earlier than scheduled without violating the Texas Constitution, so long as the employees have earned the wages paid.¹⁴

¹³ Tex. Const. Art. III, Sec. 52; Op. Tex. Att'y Gen. JM-1194 (1990).

¹⁴ Op. Tex. Att'y Gen. JC-80 (1999).

Q: Can employees use leave if the district is open, but they are unable to report to work during a disaster or for reasons related to pandemic influenza?

- A. Maybe, depending on the district's local leave policy. Districts should follow their normal leave policies for employees who miss work due to a disaster or the flu. During a disaster, some employees will be unable to come to work because roads are impassable or because they must deal with personal matters, such as lost housing or insurance claims. During a pandemic, some employees will miss work because they are sick, because a family member is sick, or because their children's schools and daycare facilities are closed.

If the employee or family member is sick or injured, the employee may be able to access state or local leave, subject to the district's usual medical certification requirements. Depending on the severity of illness, the employee may also be able to access Family and Medical Leave Act and/or temporary disability leave.

Disaster-related illnesses will fall under most districts' leave policies. Most districts define "family emergency" for purposes of state sick leave accrued before the 1995-96 school year as "disasters . . . involving the employee or a member of the employee's immediate family." Most districts apply this same definition to non-discretionary personal leave, both state and local.

Use of leave for child care purposes is more complicated. A district may reasonably interpret the term "disaster" to encompass situations where an employee is unable to work because school or childcare facilities are closed due to a pandemic. This is a local decision. Another option is for the district to waive limits on the use of discretionary leave. Many districts have local policies that limit the number of consecutive days an employee may use discretionary leave. The board may opt, through formal vote, to waive or suspend these limits to allow employees who are unable to work for child care reasons relating to a disaster or pandemic flu to use that leave. If a district chooses to waive limits for these reasons, the district should also specify the documentation it will require to support the use of discretionary leave for child care purposes.

Q: Does FMLA leave continue to run while a district is closed?

- A: Maybe. Whether a closure counts against an employee's FMLA leave entitlement depends on the duration of the closure.

Closures of less than one week: The FMLA regulations do not specifically address the impact of closures of less than a week. The regulations do, however, address the impact of holidays.¹⁵ Extrapolating from the rules on holidays, a closure during a week of FMLA leave has no effect if the employee is taking leave in increments of one week or more; the week is counted as a week of FMLA leave. If, on the other hand, an employee is using FMLA leave in increments of less than one week, the closure will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work on the day school was closed.

¹⁵ 29 C.F.R. § 825.200(h).

Closures of more than one week: The FMLA regulations address situations where an employer's business activity has temporarily ceased and employees generally are not expected to report to work.¹⁶ According to the regulations, closures of a week or more do not count toward an employee's FMLA leave.

This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is neither an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. It is important for the recipient to consult with the district's own attorney in order to apply these legal principles to specific fact situations.

Updated by Holly Claghorn, TASB Legal Services, September 2011

¹⁶ 29 C.F.R. § 825.200(h).