



School Closings and Other Employee Absences During Pandemics

TASB has received a number of inquiries recently about employee absences caused by the pandemic influenza. Frequent questions relate to when a district *must* pay employees and when a district *can* pay employees. We have also received questions about sending employees for medical examinations, excluding employees suspected of having influenza from the workplace, and requiring employees to work during suspected outbreaks. We address the most frequent questions below.

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

A. 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.

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, nonexempt employees, such as 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.

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.

Educators² are required to be employed under contracts that provide for a minimum of 187 days of service. The commissioner may reduce the number of days of service if a “calamity” forces the closing of school, but such a reduction by the commissioner does not reduce an educator’s salary. Tex. Educ. Code § 21.401. Moreover, educators who are paid on an annualized basis may not have been paid all of the wages they have earned to-date. For these reasons, a district should continue to pay educators, at least until they have been paid their total contract wages for the year.

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 *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.

For exempt employees other than educators, the analysis depends on whether the district is closed for a partial or full workweek.³ If a district is closed for part of a workweek, the FLSA mandates that these employees be paid their full salary. 29 C.F.R. § 541.602. An exempt employee is not considered to be paid on a salary basis if a district makes deductions for absences occasioned by the operating requirements of the district, i.e., if the employee is ready, willing, and able to work, a district may not make deductions for time when work is not available. 29 C.F.R. § 541.602. Thus, whether a district closes for part of a day or part of a workweek, an exempt employee who works any part of that week is entitled to be paid for the entire week.

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. 29 C.F.R. § 541.602. Like educators, however, exempt employees who are employed under a contract may have a contract right to be paid. In this case, the answer to the question depends on the terms of the employee's individual contract. A district that is closed for a full week or more should review the contracts of employees who are not educators to determine whether the district is legally-obligated to pay these employees during the closure.

Q: Can we pay employees who do not work while the district is closed?

- A. A district may pay employees whom it is not legally-obligated to pay if the district complies with the rules relating to 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. Op. Tex. Att'y Gen. GA-76 (2003). In the case of temporary closings due to natural disasters or epidemics, some boards have concluded that paying employees for hours not worked increases morale and reduces employee turnover. Another argument for paying employees who are idled by the pandemic is that it may reduce the district's exposure to unemployment claims.

Factors to consider in making this decision include:

- Personnel costs for make-up days: Even with a waiver of total days of instruction, a district may have to move its last day of instruction further into the summer. For example, a district with an original last day of May 29 that closes for two weeks may have to move its last day to June 5 or June 12, to allow sufficient time for students to take state assessments, complete course work, and take final exams. If this happens, the district will have to pay some or all of its employees for the time worked in June, *even if the district paid employees while the district was closed* (see below).
- Cost of schedule changes: Closing and reopening may have other economic impacts, including possible premium rate payments to employees who work while the district is closed (see below) and expenses associated with moving graduation ceremonies.

³ 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.

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: (1) the public purpose served by continuing wage payments; (2) the employees who will continue to receive wage payments; (3) any premium rate payments to employees who will be required to work while the school is closed; (4) the duration of the payments (which can be revisited if the district is required to remain closed for longer than anticipated).

Q: If we pay nonexempt employees for days the district is closed, and the district is forced to modify its instructional calendar, can we require the employees to work further into the summer without additional compensation?

A. Probably not. Districts that close due to pandemic influenza may be forced to modify their instructional calendars to extend the school year beyond the original last day of instruction, even if the district obtains a waiver of the requirement that it provide 180 days of instruction. The following example illustrates this possibility:

Star of Texas ISD's original last day of instruction was Friday, May 29. STISD closes on May 4, due to pandemic influenza, and is unable to reopen for four weeks. STISD determines that it will have to reopen on June 1 for two weeks to allow students to complete course work and final examinations. Accordingly, STISD's board amends the instructional calendar to provide for a last day of instruction of June 12 and STISD obtains a waiver of ten instructional days. STISD's board voted to continue paying employees for the four weeks the district was closed. STISD is now wondering whether it has to pay staff for the first two weeks of June.

Common sense might lead one to think that the district does not have to pay employees for two weeks of work when it already paid them to be idle for four weeks. Unfortunately, constitutional limits on use of public funds dictate a different result. The Texas Constitution prohibits governmental entities from advancing wages. Tex. Const. Art. III, Sec. 52; Op. Tex. Att'y Gen. JM-1194 (1990). Accordingly, a district may 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. Districts should consult local counsel for specific application of these principles.

Q: If we pay teachers and other exempt employees for days the district is closed, and the district is forced to modify its instructional calendar, can we require these employees to work under the modified calendar without additional compensation?

A. Probably. 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. Op. Tex. Att’y Gen. JC-80 (1999). As with nonexempt employees, districts should consult local counsel for specific application of these principles.

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

- A. Districts should follow their normal leave policies for employees who miss work due to the flu. 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, 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 infection, the employee may also be able to access Family and Medical Leave Act and/or temporary disability leave.

Use of leave for child care reasons is more complicated. 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. A district may reasonably interpret the term “disaster” to encompass the situation 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 childcare reasons relating to pandemic influenza 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 nondiscretionary leave for child care purposes.

Q: Can we require certain employees, such as custodial staff, to work while the district is closed?

- A. Yes, unless an employee has a disability and excusing the employee from work is a reasonable accommodation. As a general rule, a district may discipline an employee for refusing to work. A district could require, for example, that custodial staff report to work to disinfect buildings while the district is closed. However, districts must reasonably accommodate employees with disabilities, such as an employee who is medically fragile and cannot risk exposure to pandemic influenza. In such case, the district should determine whether excusing the employee would be a reasonable accommodation.

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

A. Yes, provided the board approves such action. A district can always choose to pay a premium rate to nonexempt employees who work during difficult times. Custodial and office staff may continue to work even while students are not in class. Equity may dictate that the district provide additional compensation to nonexempt employees who work during the pandemic, especially if the district continues to pay other employees who are idled. For example, some employers will pay hourly employees who work during closures a premium rate of time and one-half for regular hours. The district should be mindful that premium rate payments will affect an employee's hourly rate, for overtime purposes, during the relevant time period. As with other pay practices, premium rates should be approved by the board, with a finding that the payment serves a public purpose.

Q: Can we take disciplinary action against employees who refuse to come to work because of concerns about contracting pandemic influenza?

A. Yes, subject to the reasonable accommodation requirements of the Americans with Disabilities Act. A district may discipline an employee who refuses to come to work if the district remains open. As discussed above, however, a district must reasonably accommodate an employee who has a physical or mental condition that precludes him or her from risking exposure to pandemic influenza. Reasonable accommodation may, depending on the circumstances, include excusing an employee from work even if the employee has no available paid leave.

Q: Can we require that an employee we suspect of having influenza submit to a medical examination?

A. Yes, if the district has information that indicates the employee may pose a direct threat (see below). Most districts have a policy at DBB(LOCAL) that authorizes the superintendent or designee to require employees to submit to a medical examination. As with excluding persons from the workplace, a district should rely on objective evidence in deciding whom to send for a medical examination. TEA has emphasized that “merely sneezing or coughing without a fever or other symptoms of the flu does not require intervention. . . . [S]easonal allergies or asthma . . . do not pose a threat.” <http://ritter.tea.state.tx.us/taa/health050109.html>. Unless a person is symptomatic—fever with either a cough or sore throat, according to the Centers for Disease Control (CDC)⁴—it is unlikely that a medical examination will provide useful information.

⁴ Interim CDC Guidance for Nonpharmaceutical Community Mitigation in Response to Human Infections with Swine Influenza (H1N1) Virus, www.cdc.gov/h1n1flu/mitigation.htm.

Q: Can we require an employee whom we suspect of having influenza to stay home?

- A. Yes, but the district should rely on current medical knowledge and objective evidence, not on speculation, conjecture, or assumptions, in determining whether the employee poses a direct threat. The CDC recommends that persons who develop influenza-like illness (fever with either cough or sore throat) be strongly encouraged to self-isolate in their home for 7 days after the onset of illness or at least 24 hours after symptoms have resolved, whichever is longer.⁵

If an employee refuses to remain home, the district may consider involuntary exclusion. A district may require that an individual not pose a direct threat to the health or safety of others in the workplace. "Direct threat" means a significant risk to the health or safety of the individual or others that cannot be eliminated by reasonable accommodation. The determination that an individual poses a "direct threat" must be based on an individualized assessment of the employee's present ability to safely perform the essential functions of the job. 42 U.S.C. § 12111(3); 29 C.F.R. § 1630.2(r). In other words, there must be an objective basis for the district's concern that an individual employee presents a threat of infecting others.

TASB recommends that districts work with their local health departments and other qualified medical personnel in determining whether an individual should be asked to stay home. The Texas Department of State Health Services is currently recommending that districts exclude for one week students who are returning from Mexico. Districts should consult local counsel before adopting a similar blanket exclusion for employees.

Q: If we require an employee to stay home against his or her will, can we require the employee to use his or her accrued leave?

- A. Yes, if the employee is verifiably sick. The district should apply its usual policies if an employee is excluded from the workplace against his or her will. In most districts, policy DBB(LOCAL) allows an employee to be placed on paid administrative leave while awaiting results of an examination. If the results are that the employee has an infectious disease, the district has a legal basis for requiring the employee to use accrued leave. If the exclusion is merely precautionary, however, the district should consider maintaining the employee on paid administrative leave.

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 TASB Legal Services, May 2009

⁵ Interim CDC Guidance for Nonpharmaceutical Community Mitigation in Response to Human Infections with Swine Influenza (H1N1) Virus, www.cdc.gov/h1n1flu/mitigation.htm.