

# ALL NEW PROCESS FOR K-12 CLASSIFIED LAYOFFS

## How to Comply (and Cope) With AB 438

### **I. Preliminary Steps – As Soon As Possible and Preferably Before December 31, 2021**

- A. Designate the District Layoff Team (i.e., HR Admin, Department Directors, SpEd Director, Ed Services Admin, CBO).
- B. Gather and Review the Essential Rules and Tools.
  - 1. Pertinent Education Code sections including 45114, 45115, 45117, 45298 and 45308.
  - 2. Collective bargaining agreements, board policies, administrative regulation, and/or merit rules.
- C. Determine the reason for the layoffs.
  - 1. Lack of work or lack of funds for the ensuing school year as to permanent classified employees. (Ed. Code § 45117(a).)
  - 2. Expiration of a specially funded program. (Ed. Code § 45117(g).)
- D. Schedule a series of public board meetings to discuss, consider, and finally act on the reduction/elimination of classified services and personnel.

### **II. Pre-Layoff Procedures – recommended be completed a few weeks before March 15th, at the latest**

- A. Circulate and update the classified seniority list.
  - 1. Prepare the seniority list with all permanent and probationary classified employees, whether represented or not by the union, and include all classifications and “length of service” in each position. “Length of service” is either hours in paid status or negotiated date of hire (defined in the collective bargaining agreement). The seniority list should include confidential, supervisory and management classified employees as well as regular classified employees.
  - 2. Distribute the seniority list to all permanent and probationary classified employees and exclusive representative or indicate where they can find a copy at their work site, district office and/or district website. Use a cover memorandum which requires all employees to confirm their seniority information, if they plan to resign or retire, and to sign and date the memorandum. A deadline to complete and return the memorandum should be included. Retain records of when the memorandum was distributed and all responses.

3. Review and revise the seniority list as needed based on the responses from the employees.
  4. The governing board should adopt the seniority list.
- B. “Permanent employee,” for purposes of classified layoffs, is 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. (Ed. Code § 45117(e)(2).)
- C. Prepare a list of all substitute and short-term classified employees.
1. Generally, “short-term” classified employees is a person employed to perform a service for the district, upon the completion of which, the service required or similar services will not be extended or needed on a continuing basis. (Not longer than 75 percent of a school year, i.e., 195 working days, including holidays, sick leave, vacation and other leaves of absence, irrespective of number of hours worked per day.) (Ed. Code § 45103(d)(2).)
  2. For purposes of layoffs, “short-term” classified employees includes those short-term employees hired for 60 days or less. (Ed. Code § 45117(f).) However, short-term classified employees hired for more than 60 days may be subject to layoff pursuant to the procedures and notice requirement of section 45117.
- D. Determine which positions need to be laid off for lack of work or lack of funds or because of the expiration of a specially funded program.
- E. Prepare a layoff resolution for the governing board to approve and schedule at least one governing board meeting to consider and act on the resolution.
1. NOTE: If the layoff is due to lack of work or lack of funds, the governing must take action prior to March 15th on the resolution so appropriate notice can be given to all affected classified employees. (Ed. Code § 45117(a).)
  2. NOTE: If the layoff is due to the expiration of a specially funded program, the governing board must act on the resolution at least 60 days prior to the effective date of the layoffs.
- F. Determine the order of layoffs.
1. The order of layoff within the classification is determined by “length of service,” again, either hours in paid status or hire date as defined in the collective bargaining agreement. The employee that is employed the shortest time in the classification, plus higher classifications, shall be laid off first. (Ed. Code § 45308.)
  2. A classified employee may not be laid off if a short-term employee (hired for more than 60 days) is retained to render a service that the classified employee is qualified to render. (Ed. Code § 45117(f)(1).)

G. Displacement rights.

1. If a permanent classified employee is laid off from his/her current position, he/she may be able to displace/bump another employee from a lower classification in which the laid off employee has previously served the district.
2. While the Education Code does not specifically describe classified employees' bumping rights, such bumping rights may be set forth in the collective bargaining agreement.
3. Bumping rights of employees in the same classification with different hours will need to be reviewed as well when determining possible bumping rights.
4. It is important to know a permanent classified employee's displacement rights because it may mean that the district needs to provide a layoff notice to more than just the permanent employee subject to layoff, but also the junior employee who may be bumped.

**III. Notice Requirements – Must be completed on or before March 15<sup>th</sup> for Permanent Classified Employees**

- A. Permanent classified employees subject to layoff due to lack of work or lack of funds, must be provided written notice of their layoff on or before March 15<sup>th</sup>. (Ed. Code § 45117(a).)
1. The written notice must include (1) notice of recommendation that services will not be required for ensuing year, reason services will not be required, any displacement rights, and reemployment rights; (2) governing board layoff resolution; (3) request for hearing form; and (4) relevant Education Code sections. (Ed. Code §§ 45117(a)(1) and (2).)
  2. Written notice is to be personally served or served via U.S. registered mail, postage prepaid. (Ed. Code § 45117(c)(3)(A).)
  3. The employees subject to layoff have seven (7) calendar days from service of the written notice to request a hearing or they waive their right to a hearing. (Ed. Code § 45117(b).)
- B. The governing board must also be provided written notification of the layoff for lack of work or lack of funds on or before March 15<sup>th</sup>. (Ed. Code § 45117(a)(1).) This notice can be provided in the form of a memorandum from the Superintendent or designee with a list of the permanent classified employees subject to layoff and a sample layoff notice packet attached.
- C. If any employee timely requests a hearing, the layoff hearing is handled by an administrative law judge from OAH. (Ed. Code § 45117.) OAH should be contacted as soon as possible to schedule the hearing. Hearings most likely will be scheduled during the month of April, similar to certificated layoffs, assuming OAH is staffed to handle all the requested hearings.
- D. If any employee timely requests a hearing, the district must next prepare and serve on the employee a "District Statement of Reduction in Force" ("RIF Packet"). Included in the RIF Packet are several legal documents, a statement to respondent, statement of reduction in force, notice

of hearing, notice of participation, and relevant Government Code sections. (Ed. Code § 45117(c)(1).) The RIF Packet must be served in person or by registered mail.

1. The employee/respondent, has five (5) calendar days from service of the RIF Packet to timely file a notice of participation with the district. (Ed. Code § 45117(c)(1).)
  2. The parties are entitled to discovery pursuant to Government Code section 11507.6, but only if the discovery is requested within fifteen (15) days of service of the RIF Packet. (Ed. Code § 45117(c)(2).)
- E. If classified employees are being laid off because of the expiration of a specially funded program, the district is to give written notice of the layoff at least sixty (60) days prior to the effective date of the layoff. The written notice should include the reason for the layoff, any displacement rights, and any reemployment rights. (Ed. Code § 45117(g).) The governing board also should adopt a layoff resolution and provide a copy of the resolution with the written layoff notice. Classified employees subject to layoff due to the expiration of specially funded program do not have any rights to a hearing.

#### **IV. Hearing Preparation and Procedures**

- A. Prior to the layoff hearing for lack of work or lack of funds, the district should compile and/or prepare the following documents which may be used at hearing as exhibits.
1. The classified seniority list.
  2. All requests for hearing.
  3. All notices of participation.
  4. The March 15th governing board resolution.
  5. Lists of who was served with a March 15th notice and the RIF Packet.
  6. Copies of the March 15th notice and RIF Packet.
  7. A list of all Respondents.
  8. A classified bumping chart. (Optional.)
  9. A list or chart showing how many FTE in each affected classification there are in the current school year vs. how many the district needs for the following school year.
  10. Any documents explaining any changes in funding at the district which resulted in the layoffs from the current school year to the next.
- B. The district should determine who will be needed to testify at the hearing as to the process and procedures and reasons for the classified layoff. This typically is the head of Human Resources.

- C. The layoff hearing for lack of work or lack of funds is conducted by an ALJ from OAH. The ALJ will prepare a proposed decision containing findings of fact and a determination whether the “charges sustained by the evidence are related to the welfare of the schools and pupils of the schools.” The ALJ decision must be served on the governing board and classified employees who are subject to layoff, on or before May 7th. (Ed. Code § 45117(c)(3)(A).)
- D. The governing board may adopt, reject or revise the proposed decision from the ALJ which must be done before May 15th. The governing board should act on the ALJ proposed decision as soon as the decision is made, and prior to May 15th, so final layoff notices can be served before May 15<sup>th</sup>. (Ed. Code § 45117(c)(3)(A).)

## V. Final Notice of Layoff

- A. Final written layoff notices to those classified employees subject to layoff due to lack of work or lack of funds must be served **before** May 15<sup>th</sup>. The final written layoff notice is to be personally served or served via U.S. registered mail, postage prepaid. (Ed. Code § 45117(c)(3)(A).)

## VI. Reemployment Rights After Layoff

- A. Reemployment shall be in reverse order of layoff. (Ed. Code §§ 45308, 45114.)
- B. Permanent employees laid off for lack of work or lack of funds are eligible for reemployment for a period of 39 months and shall be reemployed in preference to new applicants. (Ed. Code § 45298; see also §§ 45308 and 45114.) Such persons have the right to participate in promotional examinations during the 39-month period. In addition, such persons will have preferential hiring rights over new applicants to a new or different classified position, if the person on the rehire list is qualified for the position, even if he or she has never served in that class or classification. (*Tucker v. Grossmont UHSD* (2008) 168 Cal.App.4<sup>th</sup> 640.)
- C. Permanent employees who take voluntary demotions or voluntary reductions in assigned time in lieu of layoff or who remain in their present position rather than be reclassified or reassigned, shall be granted the same rights as persons laid off and shall retain eligibility to be considered for employment for an additional period up to 24 months, provided that the same tests of fitness under which they qualified for appointments to the class still apply.
- D. If a merit district, any permanent classified employee who voluntarily resigns from his permanent classified position may be reinstated or reemployed within 39 months. After his/her last day of paid service without further competitive examination to a position in his/her former classification as a permanent or limited-term employee, or in a lower class, in which the employee formerly had permanent status.

## VII. Release of Non-Permanent Classified Employees

- A. A district may still release probationary employees as they see fit, without cause. However, if the probationary employee will become permanent at any time after the layoff notice is served or right to a hearing (March 15<sup>th</sup>), the probationary employee can only be laid off pursuant to the

layoff procedures outlined herein for lack of work or lack of funds. (Ed. Code §§ 45117(e)(1) and (2).)

- B. Depending on any displacement rights of a permanent classified employee, subject to layoff due to lack of work or lack of funds, a probationary employee may receive a layoff notice explaining they are being bumped by a senior permanent employee and will be laid off. The probationary employee, however, has no rights to a hearing pursuant to Education Code section 45117.

### **VIII. Possible Negotiable Issues**

- A. The Educational Employment Relations Act requires parties to meet and negotiate in good faith over subjects within the scope of representation. (Gov. Code § 3543.1.)
- B. The decision to layoff is not negotiable. (*Newman-Crows Landing Unified School District (1982)* PERB Dec. No. 223, 6 PERC 13162.) The district, however, must provide the union with notice and an opportunity to bargain over the effects of layoffs which have an impact upon a matter within scope.
- C. Not all proposals are negotiable
  - 1. Union proposes that the District be required to layoff clerk typist positions so that community relations assistants can be retained.
  - 2. Union proposes to define “lack of work” as it relates to layoffs.
  - 3. Union proposes to negotiate the order of layoffs and bumping rights.
  - 4. Union proposes to negotiate the method of determining the order of layoff of employees with equal class seniority.
  - 5. Union proposes that a senior part-time employee can bump a junior full time employee.
  - 6. Union proposes that laid off employees receive severance pay equal to one year’s wages.
  - 7. Union proposes to negotiate health and welfare benefits continuation for one year.
  - 8. Union proposes to negotiate release time for laid off employee to participate in layoff hearing.
  - 9. Union proposes that employees subject to layoff be given release time to seek other employment.
  - 10. Union proposes that laid off employees be provided employment counseling.
  - 11. Union proposes to negotiate that laid off employees be given preference for substitute positions.

12. Union proposes employees subject to a reductions in hours be provided the same rights as permanent employees subject to layoff due to lack of work or lack of funds.

D. May a district implement decision to layoff prior to completing the negotiations process?

In *Compton Community College District* (1989) PERB Order No. 720, the Board held that under some circumstances an employer, prior to agreement or exhaustion of impasse procedures, may implement a nonnegotiable decision after providing reasonable notice and a meaningful opportunity to bargain over the effects of that decision. The Board (citing *Lake Elsinore School District* (1988) PERB Dec. No. 696, at pp. 23-24 (dis. opn. of Craib, Member)) set forth the following requirements:

1. The implementation date is not an arbitrary one, but is based upon either an immutable deadline (such as the one set by the Education Code or other laws not superseded by EERA) or an important managerial interest, such that a delay in implementation beyond the date chosen would effectively undermine the employer's right to make the nonnegotiable decision;
2. Notice of the decision and implementation date is given sufficiently in advance of the implementation date to allow for meaningful negotiations prior to implementation; and
3. The employer negotiates in good faith prior to implementation and continues to negotiate in good faith after implementation as to those subjects not necessarily resolved by virtue of the implementation.



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### About Dannis Woliver Kelley

Dannis Woliver Kelley (DWK) is a full service education law firm focused on serving and providing legal representation for California public school districts, county offices of education, community colleges and other educational organizations. Established in 1976, DWK provides preventive, practical and cost effective legal counsel on key issues surrounding your core mission—the education of students.

### DWK's Labor, Employment and Personnel (LEAP) Practice Group

DWK LEAP attorneys provide sound counsel based on up-to-the-minute information, solid expertise, and extensive experience in California labor relations, employment and personnel law. Even before the Educational Employment Relations Act was passed in 1976, DWK was representing public education agencies. We continue to provide unparalleled service and results-oriented advice to employers throughout California in all areas of labor-management relations law. LEAP attorneys are trained in interest-based bargaining, including CFIER, and are trainers in the CTA/Management Interest-Based Negotiations model. We regularly negotiate on behalf of our clients concerning wages, salaries, working hours, healthcare costs containment, family leave, and numerous other issues. We have also helped managers to carry out layoffs, to obtain resignations and to assess grievances in terms of what is in the best interest of the district.