



Senate Bill 8 Offers New Flexibilities for Reducing Personnel Costs

One of the hallmarks of the special legislative session this year was Senate Bill 8 (SB 8), a bill providing flexibilities for school district management. SB 8 made a number of significant changes to the laws affecting school district employees. This article provides an overview of the provisions of SB 8 that modify nonrenewal and termination procedures, permit salary reductions, and provide for furloughs of employees on Chapter 21 (probationary, continuing, or term) contracts. Notably, SB 8:

1. changes the notice deadline for nonrenewal of term contracts or end-of-year termination of probationary contracts, and specifies procedures for delivery of such notices;
2. permits board hearings for mid-contract termination of probationary, term, and continuing contracts due to financial exigency;
3. permits alternative hearing procedures for nonrenewal of term contracts for any reason in larger districts;
4. permits widespread salary reductions under certain conditions; and
5. permits the implementation of furloughs under certain conditions.

SB 8 takes effect on September 28, 2011. However, districts will not be able to begin implementing all of the bill's provisions immediately due to practical constraints. Issues related to the effective date and implementation of SB 8's flexibility are addressed in turn below.

1. Nonrenewal Notices

First, SB 8 changes the deadline for a district to provide notice of nonrenewal of a term contract or notice of end-of-year termination of a probationary contract. Current law requires a district to deliver these notices by 45 days before the last day of instruction. Tex. Educ. Code §§ 21.103(a), .206(a). SB 8 moves this deadline to ten days before the last day of instruction. Tex. Educ. Code §§ 21.103(a), .206(a).

SB 8 also specifies a process for delivering these notices. Current law does not address notice delivery. Under SB 8, the notice must be hand-delivered on the campus where the employee is employed. Tex. Educ. Code §§ 21.103(a), .206(a), .207(a). If the employee is not present on the campus on the date that hand delivery is attempted, the district must send the notice by prepaid certified mail or express delivery services (e.g., UPS or FedEx) to the employee's address of record with the district. Notice that is post-marked on or before the 10-day deadline is considered timely. Tex. Educ. Code §§ 21.103(a), .206(a).

Effective Date: Most school attorneys agree that these statutory changes are procedural in nature and can be implemented in the spring of 2012 without impairing teachers' contract rights. Nevertheless, for one-year contracts expiring in the spring of 2012, some districts may wish to give 45 days' notice to avoid any argument about the effective date of this change.

2. Board Hearings on Financial Exigency

SB 8 authorizes board hearings for the mid-contract termination of a probationary, continuing, or term contracts due to financial exigency. Under current law, a proposed mid-contract termination for any reason must be heard by an independent hearing examiner (IHE) appointed by TEA. Tex. Educ. Code § 21.251(a). SB 8 specifies that, if termination is based on a financial exigency declared under new Texas Education Code section 44.011, the employee is entitled to a hearing "in the manner provided for nonrenewal of a term contract." Tex. Educ. Code §§ 21.1041, .159. Term contract nonrenewal cases are heard by the board or, at the board's option, by an IHE. Tex. Educ. Code § 21.207. Thus, SB 8 permits a hearing on a proposed contract termination due to financial exigency to be heard by the board or by an IHE, as determined by the board.

The flexibility to conduct a board hearing is tempered by new restrictions on a board's ability to declare a financial exigency. SB 8 adopts new Texas Education Code section 44.011, specifically addressing declaration of financial exigency. Section 44.011 permits a board to adopt a resolution declaring a financial exigency. A declaration expires at the end of the fiscal year in which it was made, unless the board adopts a resolution before the end of the fiscal year declaring a continuation for the following fiscal year. A board must provide notice to the commissioner each time it adopts a resolution declaring a financial exigency. Tex. Educ. Code § 44.011(a), (d).

In the past, boards have had discretion to determine the existence of financial exigency in their individual districts. SB 8 limits this discretion by requiring the commissioner by rule to specify minimum standards concerning the financial conditions that must exist for a board to declare a financial exigency. The bill specifies that the commissioner may use emergency rulemaking for this purpose. Tex. Educ. Code § 44.011(e)-(f).

Effective Date: The new hearing procedures discussed above require a declaration of financial exigency under Section 44.011, which in turn requires rules from the commissioner. Accordingly, districts will not be able to take advantage of these new procedures until the commissioner adopts minimum standards for declaring a financial exigency.

3. Nonrenewal Hearings

SB 8 authorizes the use of alternate hearing procedures for term contract nonrenewals in districts with an enrollment of at least 5,000 students. Tex. Educ. Code § 21.207(b-1). Again, current law requires that nonrenewal cases be heard by the board or, at the board's option, by an IHE appointed by TEA. Tex. Educ. Code § 21.207. SB 8 creates a third option in these larger districts: the board may appoint a licensed attorney to conduct the hearing and issue a recommendation. Tex. Educ. Code § 21.207(b-1).

The attorney may not be employed by a district, and neither the attorney nor the attorney's law firm may be serving as an agent or representative of a district, a teacher in a dispute between a district and a teacher, or an organization of school employees, school administrators, or school boards. SB 8 specifies procedures for conducting the hearing, preparing the record, considering the designee's recommendation, and making a final decision by the board. Tex. Educ. Code § 21.207(b-1).

Effective Date: This provision applies beginning with the nonrenewal of term contracts at the end of the 2011-12 school year. As stated above, most school attorneys agree that this procedural change does not impair teachers' rights under their current contracts. Nevertheless, districts choosing this option in 2012 should consult with their school attorneys about this matter.

4. Salary Reductions

SB 8 repeals limits on a district's ability to reduce salaries, but requires that widespread reductions apply across-the-board and establishes a new process for salary reductions.

SB 8 repealed the salary protections at Texas Education Code section 21.402(d). Section 21.402(d) had been adopted in House Bill 3646 in the 2009 legislative session. House Bill 3646 mandated pay raises for employees on the state minimum salary schedule—classroom teachers and full-time librarians, counselors, and school nurses, as well as full-time speech pathologists. House Bill 3646 also specified, through Section 21.402(d), that a district could not reduce the salary of any of these employees below 2010-11 levels for so long as the employee was employed in the same district.

The repeal of Section 21.402(d) clears the way for reduction of salaries of individual employees. For group salary reductions, however, SB 8 adopts two new requirements. First, new Section 21.4032 requires that *widespread salary reductions* in teacher salaries be applied to district administrators and other professional employees in the same percentage. A *widespread salary reduction* is a reduction in the annual salaries paid to classroom teachers in a district that is based primarily on district financial conditions rather than on teacher performance. Tex. Educ. Code § 21.4032. Second, before a district can adopt a salary reduction proposal, the district must follow a special process. Tex. Educ. Code § 21.4021. This process is discussed below, under furloughs.

Effective Date: A district may not unilaterally reduce a contract employee's pay below the previous year's level unless the district provides the employee with specific, formal notice before the penalty-free resignation date. *Brajenovich v. Alief Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 021-R10-1106 (Mar. 6, 2009). Because the PFRD has passed for the 2011-12 school year, most districts will not be able to take advantage of salary reduction flexibility until the 2012-13 school year. A few districts may have already provided formal notice of a salary reduction in anticipation of a change in the law. If your district did so, consult with your school attorney about whether to proceed in light of SB 8.

5. Furloughs

SB 8 permits districts to reduce the work schedule of contract employees and to reduce pay accordingly. New Texas Education Code section 21.4021 allows a district to furlough contract employees for up to six days if the commissioner certifies that the district's state and local funding for a school year will be less than 2010-11 levels.

Section 21.4021 imposes a number of restrictions on furloughs. A furlough may not reduce the instructional year below 180 days, and all contract personnel must be furloughed for the same number of days. An educator may not use personal, sick, or any other paid leave while the educator is on furlough. A district may reduce pay in proportion to the number of furlough days and any reduction in pay must be equally distributed over the course of an employee's contract. If a district adopts a furlough program after the PFRD, a teacher who subsequently resigns is not subject to sanctions against his or her certification for abandonment of contract. Tex. Educ. Code § 21.4021.

Process before furlough or other salary reduction: SB 8 establishes a special process that a board must follow before implementing a furlough or other salary reduction proposal. Tex. Educ. Code § 21.4022.

First, the district must use a process to develop the program or proposal that includes involvement of the district's professional staff. Second, the board must hold a public meeting. At the meeting, the board and district administration must present information regarding options considered for managing the district's available resources, including consideration of a tax rate increase and use of the district's available fund balance. The board and administration must explain how the district intends, through a furlough or other salary reduction, to limit the number of employees who will be discharged or whose contracts will be nonrenewed. If the district is considering a furlough, the explanation must state the specific number of furlough days proposed. Finally, the board and administration must provide information regarding the local option residence homestead exemption. The public and employees must be provided an opportunity to comment at the meeting.

A board's decision to implement a furlough program is final and may not be appealed. Tex. Educ. Code § 21.4022.

Effective Date: A board may adopt a furlough program only if the commissioner certifies that the district's state and local funding, per student, will be less than 2010-11 levels. Tex. Educ. Code § 21.4021(a). New Texas Education Code section 42.009 requires the commissioner to make a determination as to funding levels by July 1 of each year. Section 42.009 also sets forth the methodology the commissioner is to use to make the determination. Tex. Educ. Code § 42.009(b).

The commissioner was not able to make a funding level determination under Section 42.009 for 2011-12 because the bill did not take effect by July 1 of this year. Moreover, the PFRD has passed, restricting districts' ability to unilaterally reduce salaries of contract personnel in conjunction with a furlough. For these reasons, districts will not be able to take advantage of the furlough option created by SB 8 until the 2012-13 school year, at the earliest.

Conclusion

SB 8 lived up to its promise of increasing school district flexibility. Streamlined hearing processes, repeal of salary protection, and a new furlough option will provide valuable tools for responding to the funding crisis. However, furloughs and salary reduction flexibility will not apply until the 2012-13 school year, at the earliest. Moreover, districts will need to comply with special procedures before using these new tools. For more information about SB 8 or any other bills from this legislative session, please call your school attorney or the TASB Legal Line at 800.580.5345.

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.