



Employee and Student Legal Issues Related to the Holiday Season

'Tis the season in TASB Legal Services when perennial questions arise about this festive time of year. Districts often call with questions about giving employee bonuses or gifts in December. Administrators are also concerned about whether students are allowed to celebrate winter holidays at school. This article answers these and other seasonal questions.

1. Can the school district award bonuses to its employees during the holiday season?

No, not in the ordinary sense of the word. A pay increase or bonus is not permissible in the middle of the school year unless it was planned in advance or it is in exchange for more work. Absent these circumstances it is not advisable to give a school district employee a holiday bonus.

In the context of school district contract employees, a bonus is prohibited by the state constitution. The Texas Constitution prohibits the grant of “extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into, and performed in whole or in part.” Tex. Const. art. III, § 53. Absent additional duties or something of value exchanged for the bonus (*consideration*, to use the legal term), payment of a bonus is not permissible because the district is paying more but the employee is obligated to do nothing in addition to the same work he committed to by contract. Op. Tex. Att’y Gen. No. MW-68 (1979).

If the school board adopts a specific bonus plan in advance, however, a district may award a bonus to non-contract and contract employees. Any increase in pay for non-contract employees should be established by the board before the pay period in which the work begins. For contract employees, authorization for a bonus payment should be established in advance, either in the employee’s contract or the compensation plan. Tex. Att’y Gen. LO-94-067 (1994).

2. Can a school district give employees appreciation gifts to thank them for their work throughout the year?

Before a school district expends public funds on an appreciation gift to employees, it must consider the state constitutional prohibition on gifts of public funds. To overcome a gift of public funds challenge under article III, section 52 of the Texas Constitution, a governmental body must not only ensure that the payment accomplishes a public purpose, but must also

retain control over the funds and ensure that the district receives a return benefit. Op. Tex. Att’y Gen. No. GA-204 (2004). Plaques, flowers, frozen turkeys, and other small gifts may be allowable expenditures if the school board first determines through formal board action that these items serve a legitimate public purpose, such as increasing employee morale or productivity. It is important to remember, however, that there is “no *de minimis* exception in the constitutional language.” Tex. Att’y Gen. LO-96-136 (1996).

Further, gift cards or debit cards are not appropriate employee gifts from the district. In addition to violating the constitutional prohibitions on bonuses and gifts of public funds, giving gift cards to employees raises tax implications. Because gift cards are readily convertible to cash, they must be reported as taxable income if received from an employer. Other gifts, even if permissible otherwise, may also be reportable taxable income if not covered by a *de minimis* fringe benefit exception. Internal Revenue Serv., *De Minimis Fringe Benefits* (Aug. 4, 2017), [irs.gov/government-entities/federal-state-local-governments/de-minimis-fringe-benefits](https://www.irs.gov/government-entities/federal-state-local-governments/de-minimis-fringe-benefits).¹

3. Can parents give employees appreciation gifts to thank them for their work throughout the year?

Yes. Unlike gifts from the district to employees, gifts from parents or students would not implicate the rules related to gifts of public funds or employer wage reporting. Teachers may accept appreciation gifts from parents and students—even valuable ones—as long as the gift is not a bribe. Tex. Penal Code § 36.02. Be aware, however, that UIL coaches and sponsors for high school activities can be suspended if they accept gifts valued at more than \$500 per year from any source (other than the district) in recognition for coaching. Univ. Interscholastic League, *2017-2018 UIL Constitution & Contest Rules*, § 481, uiltexas.org/files/constitution/uil-ccr-subchapter-n-o.pdf.

4. Can schools permit holiday celebrations like classroom parties?

Yes, seasonal celebrations are permitted if they serve an appropriate instructional purpose. Teachers may include religious elements in instruction, as long as these elements would not be viewed by a reasonable person as coercing the practice of a particular religion. See *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49 (2d Cir. 2001) (rejecting lower court’s findings that celebration of Earth Day taught earth worship). In some circumstances, controversy may be avoided by carefully designing and describing classroom activities. Classroom parties can be opportunities to teach social skills, such as good manners or communication, or teach the cultural or historical significance of certain holiday traditions

¹ The Texas Ethics Commission concluded that a prepaid debit card or gift card is considered to be cash for purposes of Texas Penal Code section 36.08, which prohibits gifts to public servants who exercise discretion in connection with contracts, purchases, payments, or other transactions of government. Op. Tex. Ethics Comm’n No. 541 (2017).

or symbols. Ideally, a teacher's lesson plan for a holiday event will clearly connect the event to instructional goals. Once the district, campus, or classroom has set guidelines for holiday celebrations, be sure to share the plan with parents. Being transparent with parents about the issues raised by religion in public schools is the first step to setting a tone of cooperation and mutual support.

5. Can students exchange holiday greetings or gifts with religious messages?

Yes, the Texas Legislature passed a state law specifically stating that students and staff may exchange traditional greetings such as "Merry Christmas," "Happy Hanukkah," and "happy holidays." Tex. Educ. Code § 29.920(a). To the extent students are invited or allowed to exchange secular holiday messages, like cards or gifts, they may exchange religious messages as well.

Federal court cases involving the distribution of proselytizing or other nonschool materials on school campuses by students and community members emphasize that schools' policies and practices should be viewpoint neutral. *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011). In other words, if local school district policy or practice permits distribution of nonschool materials on school grounds, the First Amendment prevents the district from discriminating based on the viewpoints, including religious viewpoints, expressed in the materials. *Hedges v. Wauconda Cmty. Unit Sch. Dist. 118*, 9 F.3d 1295 (7th Cir. 1993); *Rivera v. East Otero Sch. Dist.*, 721 F. Supp. 1189 (D. Colo. 1989). Districts should inform parents in advance about when and how holiday messages may be exchanged. For example, some districts may choose to prohibit distribution of personal messages during instructional time, while others may choose to allow limited distribution (such as greeting cards or small gifts) during classroom celebrations. Compare *Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271 (3d Cir. 2003) (upholding school's restriction on distribution of candy canes with religious messages during class party organized as instructional time) and *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740 (5th Cir. 2009) (approving a school district policy that permitted distribution of nonschool material only at designated school parties). See TASB Policies FNAAL(LEGAL) and (LOCAL) for more information on the distribution of nonschool materials.

6. Can campuses display holiday decorations?

Yes, but be inclusive and use good judgment. State law specifically provides that districts may display symbols associated with winter celebrations if the display includes a scene or symbol of more than one religion or one religion and a secular symbol. Tex. Educ. Code § 29.920(b). Remember that this statute must be interpreted in accordance with the Establishment Clause, which prohibits schools from advancing, coercing, or endorsing a particular religion or religion over non-religion. As such, schools should not display information or images that promote or inhibit religion. If decorations are used as teaching

aids and are displayed in an objective and sensitive way that promotes understanding and respect for different beliefs, then the display is permissible. If, however, the purpose of the display is to promote a particular religious belief, the display is not permissible. *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573 (1989).

7. Can school districts educate students about winter celebrations?

Yes, school districts are allowed to educate students about the history of traditional winter celebrations.

Tex. Educ. Code § 29.920(a); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963). However, a teacher's holiday lesson plans should not proselytize or serve as a basis to present personal beliefs to students. In addition, students are allowed to use religious symbols in their artwork or creations, but a teacher may not require or suggest that students use religious symbols in their work.

8. Can our students perform religious music as part of a seasonal performance?

Yes, as long as the music is selected on the basis of its cultural or artistic value and not for a devotional purpose. A school district may include religious literature, music, drama, and arts in its curriculum and in school activities when the material is intrinsic to the learning experience and is presented objectively. E.g., *Bauchman v. West High Sch.*, 132 F.3d 542 (10th Cir. 1997) (finding no Establishment Clause violation when a school choir performed a mix of religious and secular music and performed occasionally, but not exclusively, in churches); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995) (singing religious music in choir class did not establish or endorse religion when it was not performed as religious exercise); *Florey v. Sioux Falls Sch. Dist. 49-5*, 619 F.2d 1311 (8th Cir. 1980) (upholding a Christmas program that included both religious and secular elements).

9. Can students opt out of participation during classroom activities related to particular holidays?

Yes. These requests are made for both academic and non-academic activities during the holiday season. Parents may temporarily remove their children from classes or school activities that conflict with their religious or moral beliefs by providing the teacher with a written statement to that effect. However, the removal may not be to avoid a test or for an entire semester, and the exemption from instruction does not exempt the child from grade level and graduation requirements. Tex. Educ. Code § 26.010. In addition, a school district must excuse a student from attending school for the purpose of observing religious holy days, including traveling for that purpose. A student whose absence is excused to observe a

religious holy day may not be penalized for the absence and must be allowed a reasonable time to make up the school work missed. If the student satisfactorily completes the school work, the day missed will be counted as a day of compulsory attendance. Tex. Educ. Code § 25.087(b), (d).

Don't let legal restrictions turn you into a Scrooge this holiday season. By following these guidelines, you can express appreciation to your district's employees and allow students to experience the holidays while staying within the bounds of the law. If you have any legal questions about this article or any other legal issue, feel free to call the toll free 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.

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