



Personnel Issues During Disasters, Emergencies, and College Closings¹

Community colleges may find their operations disrupted by a disaster or emergency, such as a weather event or pandemic, that requires closure of one or more college campuses or results in employee absences. These circumstances raise several questions related to employee pay and leave, including concerns related to who must be paid during a closure and if the payment may be a premium payment; the payment of employees who do not work during a closure; the use of leave; and options for extension of leave.

Q: *Is a community college required to pay employees who do not work while the college is closed due to a disaster or emergency?*

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

Nonexempt employees: Whether a community college is closed for part of a day, part of a week, or a full week or more, the FLSA does not require the college to pay nonexempt employees for time they do not work. However, an exception may apply to a salaried, nonexempt employee who is paid a fixed salary for a workweek of variable hours. 29 C.F.R. § 778.306.

Exempt employees: For exempt employees, the analysis depends on whether the community college is closed for either a partial or full workweek. 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 an exempt employee works any part of a workweek, the FLSA mandates that the employees be paid their full weekly salary. If a community college is closed for a full workweek and an exempt employee performs no work, the FLSA does not require the college to pay the employee. 29 C.F.R. § 541.602.

These exempt employee payment rules are subject to limited exceptions. For example, the rules do not apply to instructors. 29 C.F.R. § 541.303. Additionally, an employee may be working under a contract that requires that the community college pay the employee for a week not worked. Consult legal counsel before reducing the pay of these employees.

¹ An electronic version of this document is available on TASB College eLaw at tasb.org/services/community-college-services/resources/tasb-college-elaw/documents/personnel-issues-during-disasters-emergencies-and-college-closings.pdf.

Q: *If not legally obligated to do so, is it permissible for a community college to pay employees who do not work while the college is closed?*

A: Yes. A community college may pay employees, even if it is not legally obligated to pay them, if the college takes steps to avoid an improper use, or gift, of public funds.

In the case of temporary closings due to disasters or emergencies, some community college board of trustees have concluded that paying employees for hours not worked increases morale and reduces employee turnover. TASB Policy DEA(LOCAL), at Pay During Closing, allows a community college to authorize such payment by resolution or other board action. In a situation where the college faces risks of an epidemic or pandemic, a college may authorize payment to an employee staying home from work as a precautionary measure through board action.

To overcome a gift of public funds challenge, a community college 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 college receives a return benefit. Tex. Att’y Gen. Op. No. KP-0204 (2018). Applying those requirements in the context of payments during closure, a community college board should adopt such a resolution or take similar action at an open meeting that complies with the Texas Open Meetings Act. The resolution or action should address:

1. the public purpose served by continuing wage payments;
2. which employees will continue to receive wage payments;
3. if applicable, whether nonexempt employees who will be required to work while the community college is closed will receive premium payments (discussed below);
and
4. the duration of the payments, which can be revisited if the college is required to remain closed for longer than anticipated.

Attached is a template resolution to authorize wage payments during an emergency closing.

Q: *May the wage payments made during a closure be considered an advance of wages in anticipation of the employee making up worked missed?*

A: Community colleges may be tempted to treat wage payments to employees not required to work during a college closing as an advance against any additional days of work required by the closing. However, the Texas Constitution prohibits governmental entities from advancing wages as the advance constitutes a personal loan. The college must first take steps to address the gift of public funds concerns and

find a public purpose to justify the payment. Tex. Const. Art. III, § 52; Tex. Att’y Gen. Op. No. JM-1194 (1990). Community colleges should work with their local attorney before advancing employee wages.

Note, in some circumstances, continued payment to employees during a closure may not be considered an advanced payment. For example, if a community college may pay salaried employees who work a nine-month schedule on an annualized basis, spreading their salary over twelve months. At any given time during the college year, these employees have earned more than the community college has paid them. Thus, continuing payments to these employees is not an advance of wages. Moreover, the Texas 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. Tex. Att’y Gen. Op. No. JC-0080 (1999).

Q: *May a community college pay a premium to employees who are required to work while the college is closed?*

A: Yes. A community college may pay a premium to nonexempt employees who work during college closures. For example, some employers pay hourly employees who work during closures a premium rate of time and one-half for regular hours worked instead of the employees’ regular rate. The college should be mindful that premium payments may affect the employee’s hourly rate for overtime purposes during the relevant time period. 29 C.F.R. § 778.108.

Because a community college is not legally required to pay a premium, the decision should be made in advance of the payment and should address the gift of public funds concerns described above. This decision can be reflected in T ASB Policy DEA(LOCAL). The policy administrator at a community college that has localized with TASB Community College Services may contact the college’s policy consultant for model language.

Q: *Will the community college receive reimbursement from federal disaster funds for labor costs during college closings?*

A: A community college may be eligible for reimbursement of certain wages paid to employees who worked during a disaster-related closing. The Federal Emergency Management Agency (FEMA) Public Assistance Program and Policy Guide (PAPPG) provides for reimbursement of some labor costs incurred during a disaster covered by a federal disaster declaration. Federal Emergency Management Agency, [Public Assistance Program and Policy Guide](#) (Apr. 26, 2018).

The PAPPG provides that FEMA determines eligibility for public assistance funding for overtime, premium pay, and compensatory time costs based on the community college's written policy in place before the disasters, provided the policy: (1) does not make the wage payments contingent on federal funding; (2) is applied uniformly regardless of whether there has been a presidential declaration of a disaster; and (3) has a non-discretionary criteria for when the community college activates various pay types. Federal Emergency Management Agency, [Public Assistance Program and Policy Guide](#) (Apr. 26, 2018). The policy administrator at a community college that has localized with TASB Community College Services may contact the college's policy consultant for model language that aligns with the FEMA PAPPG.

The availability of funds for reimbursement after a disaster involves a case-by-case determination by FEMA based on the eligibility requirements in the PAPPG. In determining eligibility for reimbursement, courts and administrative decisions defer to FEMA's discretionary authority. Community colleges should work with their local attorney on these issues. Given the discretionary nature of FEMA reimbursements, a community college should not provide premium pay for employees solely in anticipation of federal assistance.

Q: *How may a community college prepare to request reimbursement for labor costs from FEMA?*

A: As described above, FEMA has discretionary authority to determine reimbursement eligibility for disaster-related expenses, including labor costs. FEMA will make these determinations based on the PAPPG and other guidance released in response to the disaster.

For example, in response to the COVID-19 pandemic, FEMA posted pandemic related resources on its [Coronavirus \(COVID-19\) Response Website](#). FEMA also released COVID-19 guidance suggesting that only certain labor expenses related to emergency work, specifically emergency protective measures, performed as a result of the disaster are eligible for reimbursement. FEMA guidance also describes the types of emergency protective measures, such as deep cleaning facilities, that may be eligible for reimbursement. Federal Emergency Management Agency, [Coronavirus COVID-19 Pandemic: Eligible Emergency Protective Measures](#) (Mar. 19, 2020), [Talking Points PA Application Simplification for COVID-19](#) (Mar. 22, 2020). See also the Texas Division of Emergency Management [Applicant Briefing and Request for Public Assistance Website](#).

Community colleges can prepare for disaster-related reimbursement requests by documenting expenses and attending training. For example, FEMA provides an [online course on grant application](#)

Q: *If a community college schedules make-up classes or workdays within the original academic calendar or modifies the calendar to extend a semester end date, may contract employees be required to work the make-up classes or workdays?*

A: The answer depends upon the terms of the employee's contract. Contract employees are required to work the schedule described in their contracts and any related documents. Thus, the community college must determine what schedule the employee agreed to work to determine if the employee may be required to work the make-up classes or workdays without additional compensation. The college should also consider if the situation raises a concern regarding the payment of advanced wages, described above.

Q: *May employees use leave if the community college is open but they are unable to report to work during an disaster or emergency?*

A: The answer depends on the community college's leave policy. Community colleges should follow their normal leave policies for employees who miss work due to an disaster or emergency.

Community colleges may choose to specifically address emergencies and disasters in policy. Colleges that have adopted model language from TASB Community College Services at policy DEC(LOCAL) define *family emergency* to include disasters and allow the use of sick leave for that purpose.

In the case of widespread health event, such as a pandemic, a community college may see a public benefit to extending additional leave, paid or unpaid, to allow a person to stay at home in the case of potential exposure to a virus. To avoid a gift of public funds challenge, the board should pass a resolution to determine a public purpose served if employees do not report to work during a period of a quarantine. Such a resolution should reflect a community college's local needs and address whether leave for a quarantine is paid or unpaid, whether the leave applies to a voluntary quarantine or a community college-requested quarantine, the number of days of leave available, and if an employee is required to show cause for a voluntary quarantine. A template for such a resolution can be found as an attachment and should be used in consultation with local counsel.

A community college may also decide to offer additional extended sick leave to protect employees who become ill during an epidemic or pandemic or who need to care for a sick family member. The community college can provide additional leave by passing a board resolution to find a public purpose for such a benefit. A sample resolution is attached. Community colleges will want to work with local counsel to determine the parameters around offering additional extended leave.

Q: *May a community college authorize a leave donation bank for employees absent because of disaster- or emergency-related circumstances?*

A: Yes. The creation of a leave-sharing plan for use in an emergency or as a result of a major disaster is a local decision that can be reflected in a community college's policy DEC(LOCAL). Such a plan should be contingent on a presidential disaster declaration and made available to employees adversely affected by a major disaster as defined by law. According to IRS guidance, if the leave is for a disaster that has caused severe hardship to the employee or to a family member of an employee that requires the employee to be absent from work, the leave donor will not incur negative tax consequences. I.R.S. Notice 2006-59, Bulletin No. 2006-28 (July 10, 2006). In crafting the policy language, the community college should work with its local attorney to ensure tax liability is not created on behalf of the leave donor.

Q: *Does FMLA leave continue to run while a community college is closed?*

A: Maybe. Whether a closure counts against an employee's Family Medical Leave Act (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. 29 C.F.R. § 825.200(h). 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. However, if 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 the college was closed.

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. 29 C.F.R. § 825.200(h). According to the regulations, closures of a week or more do not count toward an employee's FMLA leave.

For more information on community college law topics,
visit TASB Community College eLaw online at colleges.tasb.org/elaw.

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 college's own attorney in order to apply these legal principles to specific fact situations.

Updated April 2020

Appendix

- A. Resolution of the Board Regarding Wage Payments During Emergency Community College Closings (Includes Premium Pay)
- B. Resolution of the Board Regarding Wage Payments During Emergency Community College Closings (No Premium Payment)
- C. Resolution of the Board Regarding Extension of Leave During a Precautionary Exclusion
- D. Resolution of the Board Regarding Extended Sick Leave During an Epidemic or Pandemic

Appendix A
**Resolution of the Board Regarding Wage Payments During Emergency
Community College Closings (Includes Premium Pay)**

[This sample resolution is for community colleges that wish to provide premium payments to employees required to report for duty during a closure.]

[Adjust the following as necessary to align with policy text at DEA(LOCAL), if any, regarding continued wage payments and/or premium pay during an emergency closing.]

WHEREAS, the Board is authorized by law to expend funds of _____
College for College operations;

WHEREAS, the Board acknowledges that during an emergency closing, most College employees are instructed not to report for work, and other employees may be called upon to provide emergency-related services;

WHEREAS, the Board finds that a need exists to address wage payments for employees who are idled and those required to work during emergency closings;

WHEREAS, the Board determines that employees who are instructed not to report to work may suffer a loss of pay if the College is closed;

WHEREAS, the Board concludes that continuing wage payments to all regular employees—contractual and noncontractual, salaried and non-salaried—who suffer a loss in pay due to an emergency closing serves the public purposes of maintaining morale, reducing turnover, and ensuring continuity of College staffing when colleges reopen; and

[Include the text below if the community college’s DEA(LOCAL) includes provisions that address premium pay, such as time and a half, for employees who are required to work during an emergency closing.]

WHEREAS, as to nonexempt employees who are called on to work during an emergency closing, the Board further concludes that payment of these employees at a premium rate, as provided at DEA(LOCAL), serves the public purposes of maintaining morale, providing equity between idled employees and employees who provide emergency-related services, and recognizing the services of essential staff;

NOW, THEREFORE, BE IT RESOLVED that the Board of Trustees of _____
College authorizes continued wage payments to all regular employees—contractual and noncontractual, salaried and non-salaried—who are instructed not to report to work during an emergency closing.

BE IT FURTHER RESOLVED that nonexempt employees who are required to work during an emergency closing shall be paid at the premium rate described at DEA(LOCAL).

Or

[Include the text below if the community college’s DEA(LOCAL) does not include provisions for premium pay, such as time and a half, to employees who are required to work during an emergency closing.]

Note: If the community college intends to seek reimbursement from FEMA for extraordinary costs for essential employees who are required to perform disaster-related emergency work, the community college must have local policy provisions providing for those costs prior to the disaster.

WHEREAS, as to nonexempt employees who are called on to work during an emergency closing, the Board further concludes that payment of these employees at a premium rate, as provided in this resolution, serves the public purposes of maintaining morale, providing equity between idled employees and employees who provide emergency-related services, and recognizing the services of essential staff;

NOW, THEREFORE, BE IT RESOLVED that the Board of Trustees of _____ College authorizes continued wage payments to all regular employees—contractual and noncontractual, salaried and non-salaried—who are instructed not to report to work during an emergency closing.

BE IT FURTHER RESOLVED that nonexempt employees who are required to work during an emergency closing shall be paid at the premium rate of _____ (e.g., one and one-half times their regular rate of pay) for all hours worked up to 40 hours per week. Overtime for time worked over 40 hours in a week shall be calculated and paid according to law.

The authority granted by this resolution to continue wage payments to idled employees and to pay a premium rate to nonexempt employees who provide emergency-related services is effective for a closure with a maximum duration of _____ (e.g., one week) unless the Board takes action to authorize payment for a longer duration.

Adopted this _____ (date) day of _____ (month), _____ (year), by the Board of Trustees.

Presiding Officer

Secretary

Appendix B
Resolution of the Board Regarding Wage Payments During Emergency
Community College Closings (No Premium Payment)

[This sample resolution does not include provisions to provide premium payments to employees required to report for duty during a closure.]

[Adjust the following as necessary to align with policy text at DEA(LOCAL), if any, regarding continued wage payments during an emergency closing.]

WHEREAS, the Board is authorized by law to expend funds of _____
College for College operations;

WHEREAS, the Board acknowledges that during an emergency closing, most Community college employees are instructed not to report for work;

WHEREAS, the Board finds that a need exists to address wage payments for employees who are idled;

WHEREAS, the Board determines that employees who are instructed not to report to work may suffer a loss of pay if the Community college is closed; and

WHEREAS, the Board concludes that continuing wage payments to all regular employees—contractual and noncontractual, salaried and non-salaried—who suffer a loss in pay due to an emergency closing serves the public purposes of maintaining morale, reducing turnover, and ensuring continuity of Community college staffing when colleges reopen;

NOW, THEREFORE, BE IT RESOLVED that the Board of Trustees of _____
College Community college authorizes continued wage payments to all regular employees—contractual and noncontractual, salaried and non-salaried—who are instructed not to report to work during an emergency closing.

The authority granted by this resolution to continue wage payments to idled employees is effective for a closure with a maximum duration of _____ (e.g., *one week*) unless the Board takes action to authorize payment for a longer duration.

Adopted this _____ (date) day of _____ (month), _____ (year), by the Board of Trustees.

Presiding Officer

Secretary

Appendix C
Resolution of the Board Regarding Extension of Leave
During a Precautionary Exclusion¹

WHEREAS, the Board is authorized by law to expend funds of _____
College for College operations;

WHEREAS, the Board acknowledges that during an epidemic or pandemic, College employees may be instructed not to report for work (***or decide voluntarily not to report to work***);

WHEREAS, the Board finds that a need exists to address additional leave for employees who are instructed not to report for work (***or decide voluntarily not to report to work***) (***and have exhausted all available state and local leave days***);

WHEREAS, the Board determines that employees who are instructed not to report to work may suffer a loss of pay if they do not report for work (***or decide voluntarily not to report to work***) (***and have exhausted all available state and local leave days***); and

WHEREAS, the Board concludes that providing additional paid leave to all regular employees—contractual and noncontractual, salaried and non-salaried—who are instructed not to report to work due to an epidemic or pandemic (***or decide voluntarily not to report to work***), serves the public purposes of protecting students and staff, maintaining morale, and reducing turnover;

NOW, THEREFORE, BE IT RESOLVED that the Board of Trustees of _____
College authorizes providing additional paid leave for all regular employees—contractual and noncontractual, salaried and non-salaried—who are instructed not to report to work during an epidemic or pandemic (***or decide voluntarily not to report to work***) (***and have exhausted all available state and local leave days***).

The authority granted by this resolution to provide additional paid leave for all employees instructed not to report for work (***or who decide voluntarily not to report to work***) provides additional leave for a maximum duration of _____ (e.g., two weeks) unless the Board takes action to authorize leave for a longer duration.

¹ This resolution can be modified by deleting or accepting the bolded provisions to provide: extra paid leave for involuntary exclusion; extra paid leave for involuntary and voluntary exclusion (with optional show cause provision); and/or extra paid leave only available if leave is exhausted. Additionally, a community college may decide to edit this resolution to authorize only unpaid leave (e.g.: job protection). If the college determines that it will deduct from the employee’s daily rate for each day of extended leave taken, that information should also be reflected in the resolution or accompanying regulations.

[Include the text below if the community college requires an employee to show cause for a voluntary exclusion.]

To ensure an employee's voluntary exclusion serves the public purpose of protecting students and staff, employees requesting additional leave must show cause for voluntary exclusion from work such as potential exposure to virus or travel in a high-risk area.

Adopted this _____ (date) day of _____ (month), _____ (year), by the Board of Trustees.

Presiding Officer

Secretary

Appendix D
Resolution of the Board Regarding Extended Sick Leave
During an Epidemic or Pandemic²

WHEREAS, the Board is authorized by law to expend funds of _____
College for College operations;

WHEREAS, the Board acknowledges that during an epidemic or pandemic, College employees may exhaust available state and local leave days;

WHEREAS, the Board finds that a need exists to address additional leave in the circumstance of an epidemic;

WHEREAS, the Board concludes that providing additional paid leave to all regular employees—contractual and noncontractual, salaried and non-salaried—who are sick as a result of an epidemic serves the public purposes of protecting students and staff, and maintaining morale;

NOW, THEREFORE, BE IT RESOLVED that the Board of Trustees of _____
College authorizes providing additional paid leave for all regular employees—contractual and noncontractual, salaried and non-salaried—who are sick as a result of an epidemic or pandemic and have exhausted available state and local leave days;

The authority granted by this resolution to provide additional paid leave for a maximum duration of _____ (e.g., *two weeks*) unless the Board takes action to authorize leave for a longer duration.

Adopted this _____ (date) day of _____ (month), _____ (year), by the Board of Trustees.

Presiding Officer

Secretary

² This resolution authorizes additional paid sick leave for all regular employees who have exhausted available leave days. The community college will determine the maximum duration of the leave. Additionally, a college may decide to edit this resolution to authorize only unpaid leave (e.g.: job protection). If the college determines that it will deduct from the employee’s daily rate for each day of extended sick leave taken, that information should be reflected in the resolution or accompanying regulations. If desired, the community college can revise the resolution to cover extended leave for the care of a member of the employee’s immediate family who is sick.