

Reducing Personnel Costs

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Introduction

At times, in order to balance the budget, the district has no choice but to cut staff costs. As the district considers its options, it must bear in mind the legal ramifications and practical implications of each proposed solution. It may be necessary to think about the total time necessary to visualize, communicate, and accomplish these strategies. Some of the solutions presented may require more than one school year to complete. To prevent grievances and poor morale among staff, build in sufficient time to communicate openly with staff about the district's financial situation and its strategies for meeting the financial crisis while losing as few employees as possible.

1. FREEZING PAY

Proposed Solution: The school district is considering freezing pay for all staff at the same rate as the previous school year.

Legal Ramifications:

At-will and non-certified positions: For both at-will and professional employees in non-certified positions, no legal impediment restricts the school district from freezing pay.

State minimum salary: Classroom teachers, full-time librarians, full-time counselors, and full-time nurses are entitled to be paid not less than the minimum monthly salary, based on the employee's level of experience, specified by state law. Tex. Educ. Code § 21.402; 19 Tex. Admin. Code § 153.1022. In addition, classroom teachers, nurses, librarians, counselors, educational diagnosticians, principals, assistant principals, superintendents, and others required by law or the district to hold certification are entitled to contracts governed by Chapter 21 of the Texas Education Code. Tex. Educ. Code §§ 21.002-.003.

Floor set at penalty-free resignation date: Certified educators may unilaterally resign without penalty (the "penalty-free resignation date") up until 45 days before the first day of instruction. Tex. Educ. Code § 21.210(a). After the penalty-free resignation date, the school district is obligated to pay educators at least the amount they received the previous year since that is what they reasonably relied on when deciding to remain with the district. *San Elizario Educators Ass'n v. San Elizario Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 222-R3-392 (Dec. 9, 1994).

Reducing elements of pay: An educator is not entitled to the previous year’s level of any single element of compensation (e.g., a supplemental duty stipend or a local supplement), so long as the employee’s total pay is at least as much as the previous year, even if the changes are announced after the penalty-free resignation date. *Saenz v. San Diego Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 089-R10-199 (Aug. 6, 1999); *Griffin v. Van Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 084-R10-197 (May 7, 1998).

If the district discontinues a supplemental duty that is part of the teaching contract and lowers compensation below the prior year’s salary, the district should notify the employee of the reduction in salary before the penalty-free resignation date. *Alaniz v. Donna Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 029-R10-02-2018 (July 13, 2018); *Salinas v. Roma Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 058-R3-1196 (Dec. 11, 1997). A district should contact its local counsel if termination of a supplemental duty results in an employee receiving less total compensation than in a prior year and no notice was provided before the penalty free resignation date.

No raise required: A district is not required to give a pay raise, even if it has traditionally done so. *See Smith v. Amarillo Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 184-R10-799 (April 26, 2000) (upholding district’s decision to abandon traditional midpoint raise system after legislature mandated teacher pay raise). A limited exception applies to districts that do not pay any amount over the state minimum salary schedule: those districts must continue to advance teachers, librarians, counselors, and nurses one step for each year of experience. *See Tex. Educ. Code § 21.402; 19 Tex. Admin. Code § 153.1022.*

Even after the penalty-free resignation date, a district is not required to maintain its salary schedule from the previous year, so long as the district does not reduce an educator’s total compensation. *United Educators Ass’n v. Arlington Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 012-R10-1102 (Oct. 21, 2004) (denying teachers’ grievance after district gave one percent raise, which yielded less of an increase than some would have earned under the previous salary schedule).

Practical Implications: Be cautious about solutions that are legally expeditious but that violate a fundamental sense of fairness, such as freezing pay for only certain classes of employees.

2. HIRING FREEZE

Proposed Solution: The district is considering implementing a hiring freeze. This would allow the district to reduce staff by attrition.

Legal Ramifications:

Attrition: The district is not required to fill vacancies caused by natural attrition, namely resignations, retirements, nonrenewals, and terminations for cause.

Class size requirements: A district must maintain an average ratio of not less than one teacher for each 20 students in average daily attendance. Tex. Educ. Code § 25.111. For kindergarten through 4th grade, a district may not enroll more than 22 students in a class unless the district obtains a waiver from the commissioner. Tex. Educ. Code § 25.112. Finally, if the student-to-teacher ratio for physical education classes exceeds 45 to 1, a district must specifically identify the manner in which the safety of students will be maintained. Tex. Educ. Code § 25.114(b).

Reassignment of remaining employees: If a district allows its workforce to shrink by not filling vacancies left by natural attrition, the district will have fewer employees to accomplish its business. This will require the district to consolidate functions, reassign duties among positions, and in some cases reassign employees to different positions. Both local policy and educators' contracts typically provide that employees are subject to reassignment. Generally, as long as a reassignment does not decrease contractually-guaranteed compensation or assign the employee to a different *professional capacity*, the reassignment is permissible. See, e.g., *Jenkins v. Crosby Ind. Sch. Dist.*, 537 S.W.3d 142 (Tex. App—Austin 2017, pet. denied) (upholding a teacher's reassignment when changes did not violate the teacher's contract or reduce her pay).

Decisions about reassigning duties and staff are vested in the superintendent by law and policy. See TASB Policies BJA (superintendent's duties), DK (personnel assignments), and DP (principal's duties). Nevertheless, when these decisions occur as part of an overall strategy to reduce costs and positions, superintendents and boards normally collaborate in articulating the district's fiscal and staffing goals.

Assignment outside of certification: All teachers must meet state qualification and licensing criteria for the grade levels and subject areas in which the teacher provides instruction or be teaching under emergency or other provisional status through which state qualification or licensing criteria have been waived. See TASB Policy DBA(LEGAL). If the district assigns an inappropriately certified or uncertified teacher to the same classroom for four or more

consecutive weeks, the district must provide written notice of the assignment to the parents or guardians of each student in that classroom. The written notice may be provided in compliance with the Every Student Succeeds Act, 20 U.S.C. § 6312(e)(1)(b)(ii), or in accordance with Texas Education Code section 21.057 (requiring notice after 30 consecutive days of classroom instruction). See TASB Policy DK(LEGAL).

Emergency permits: A district may activate an emergency permit only when a *competent* teacher—meaning an appropriately certified and qualified individual—is not available. *Meridith v. Austin Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 022-R10-1204 (Mar. 5, 2007). A certified teacher must consent to the activation of an emergency permit and be advised of the conditions of the emergency permit. A teacher who refuses to consent to activation of an emergency permit may not be terminated, nonrenewed, or otherwise retaliated against because of the teacher’s refusal. However, a teacher’s refusal does not impair the district’s right to implement a necessary reduction in force or other personnel action in accordance with local policy. 19 Tex. Admin. Code § 230.71(e). See TASB Policy DBA(LEGAL).

Advertising for open positions: Must the district post notice of vacancies as the superintendent is reassigning the remaining staff? In most circumstances, the answer is, “No.” With limited exceptions for vacancies that must be filled during the school year, a district must post notice of vacancies for certified positions for ten school days before filling the positions. Tex. Educ. Code § 11.1513(d). A *vacancy* occurs when an applicant will be offered a new contract for an open position. If an employee is simply reassigned under his or her current contract, a new contract is not necessary. However, the position that employee vacated may become a vacancy if it is not filled by reassignment.

Practical Implications: An employee assigned to a position for which he is not fully certified should be placed on a deficiency plan. Consider also seeking a contract addendum specifying a time by which the employee must be fully certified.

Remember to engage in open communication with employees about the district’s situation. Alert employees as soon as possible to the benefit of gaining certification in new subjects.

3. REDUCING PAY

Proposed Solution: The district may consider paying some employees less than they made the previous year. For example, the district may reduce some administrators from 12- to 11-month contracts. Under certain circumstances, a district may reduce teacher salaries.

Legal Ramifications:

At-will and non-certified positions: A district may reduce the pay of an at-will employee prospectively at any time, so long as the district continues to pay employees subject to the Fair Labor Standards Act (“nonexempt” employees) at least minimum wage (\$7.25/hour). A district may reduce the salary of a non-certified professional employed under a non-Chapter 21 contract between contract years or in accordance with the terms of the contract.

Certified employees: Most Texas districts pay educators more than is required under the state minimum salary schedule. The difference between the state minimum salary schedule and local pay schedules is often referred to as the “local supplement.” So long as covered employees are paid at least the amount specified in the state minimum salary schedule, a district may reduce or eliminate the local supplement of certified employees between school years by providing notice before the penalty-free resignation date. *United Educators Ass’n v. Arlington Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 012-R10-1102 (Oct. 21, 2004).

Notice of potential salary reductions: Districts are often locked into a salary floor by the penalty-free resignation date before they have received firm revenue projections for the next school year. Consequently, the commissioner has agreed that districts may reduce compensation after the penalty-free resignation date if employees are given sufficient warning. See *Brajenovich v. Alief Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 021-R10-1106 (Mar. 6, 2009) (district employee could reasonably determine his possible salary reduction from the district’s salary schedule); *Socorro Educ. Ass’n v. Socorro Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 039-R10-101 (Feb. 11, 2002) (denying appeal where teachers received notice of a potential reduction in number of duty days).

Sufficient notice: To be sufficient, notice of salary reduction must be both formal and specific. To be formal, the notice must be in writing from a person in a position of authority. To be specific, the notice must convey how much of a reduction of salary is possible. The question to be answered is whether the employees actually knew or reasonably could have known, before the penalty-free resignation date, the amount their salaries could be reduced. *Brajenovich v. Alief Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 021-R10-1106 (Mar. 6, 2009) (denying appeal where administrator could determine possible salary reduction from district’s salary schedule).

Widespread salary reductions: Additional requirements apply when a district seeks to enact a widespread salary reduction. A *widespread salary reduction* is a widespread reduction in the annual salaries paid to classroom teachers based primarily on district financial conditions rather than on teacher performance. Tex. Educ. Code § 21.4032(a). If a district reduces the annual salaries paid to classroom teachers from the preceding school year, the district must reduce the annual salaries paid to district administrators and other professional employees by the same percentage. Tex. Educ. Code § 21.4032(b).

Salary reduction process: A board must follow a special process before implementing a 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 salary reduction, to limit the number of employees who will be discharged or whose contracts will be nonrenewed. 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.

Practical Implications: Employees will never be enthusiastic about a reduction in pay. However, when faced with a choice between losing staff and cutting or freezing pay for all, some districts have been able to generate employee support for a plan that will save jobs.

Pay reductions may create unemployment liability. As a general rule, an overall pay reduction (including benefits) of 20 percent or more will provide an employee with good cause to voluntarily resign, entitling the claimant to unemployment compensation. Keep this rule in mind when deciding how much to reduce compensation.

4. FURLOUGHS

Proposed Solution: The district may consider reducing the work schedule of some employees, and reducing compensation by a corresponding amount.

Legal Ramifications:

Furloughs: Districts often seek to reduce employee work schedules to offset any reduction in salaries. Previously, these efforts were frustrated by the state minimum salary schedule and a state law that requires educators to be employed for a minimum of 187 days per

year. Tex. Educ. Code § 21.401(b). In 2011, the Texas Legislature changed the law to permit districts to furlough educators for up to six days, even if the furlough would reduce salaries below the state minimum and reduce the duty schedule below 187 days. Tex. Educ. Code § 21.4021(a)-(b).

Section 21.4021 of the Texas Education Code 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 paid leave while on furlough. A district may reduce pay in proportion to the number of furlough days; 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 penalty-free resignation date, a teacher who subsequently resigns is not subject to sanctions against his or her certification for abandonment of contract. Tex. Educ. Code § 21.4021.

A district may use the new furlough authority in a school year only if the commissioner has certified that the district will be provided with less state and local funding for that year than was provided for the 2010-2011 school year. Tex. Educ. Code § 21.4021(a). The commissioner is required to make a determination as to funding levels by July 1 of each year. Tex. Educ. Code § 42.009(b). Because the legislature has revised the school finance system significantly, it is unlikely that funding levels will dip below 2010-11 school year levels. Therefore, it is unlikely that furloughs will be an option available to districts in the future.

Salary reduction process: A board must follow a special process 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.

Practical Implications: Employees may be more accepting of a pay reduction if it is accompanied by a reduced duty schedule. However, reducing an employee's schedule by a set number of duty days may conflict with local pay practices of compensating employees on a monthly basis.

5. REDUCTION OF AT-WILL POSITIONS

Proposed Solution: Attrition and reassignments of duties and staff have not been sufficient to meet the district's financial needs. As part of an overall strategy for reducing positions, the district may eliminate selected at-will positions.

Legal Ramifications:

The reduction in force process described below is not required to eliminate at-will positions. At-will employees may be discharged at any time for any reason that is not prohibited by law. *Winters v. Houston Chronicle Pub. Co.*, 795 S.W.2d 723 (Tex. 1990); *Camp v. Union Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 084-R2-1293 (Jan. 7, 1997). See TASB Policies DCD(LEGAL) and (LOCAL).

To preserve the district's ability to respond to an allegation that an employee's dismissal was motivated by an illegal reason, the district should create and maintain adequate documentation that firing decisions were motivated by costs. Even though a formal reduction in force (RIF) process is not required to eliminate at-will jobs, the district would be wise to develop and document a non-discriminatory method for identifying which positions will be cut.

Practical Implications: Don't forget to factor in the cost of unemployment. Unemployment compensation is paid after the district has already paid any salary, severance pay, or unused leave pay owed to the employee. In addition, the federal government has offered an emergency unemployment package that may provide additional benefits

6. REDUCTION OF PROBATIONARY CONTRACT AND NON-CHAPTER 21 CONTRACT POSITIONS (END OF SCHOOL YEAR)

Proposed Solution: As part of its overall strategy for reducing positions, the district may decide to terminate some or all educators employed under probationary contracts at the end of the school year. The district may also eliminate positions held by employees on non-chapter 21 contracts.

Legal Ramifications:

Not renewing probationary contracts: To terminate a probationary contract at the end of the contract term, the board must: (1) determine whether termination will serve the best interests of the district; *and* (2) provide the employee with notice of the board's decision by

the date specified in statute. Tex. Educ. Code § 21.103(a). The board does not have to make any findings, document its decision, or provide any reasons for termination.

Notice deadline: The deadline to provide notice of end-of-year termination of a probationary contract was changed in 2011. Previous law required districts to deliver these notices by 45 days before the last day of instruction. The 2011 change moved this deadline to ten days before the last day of instruction. Tex. Educ. Code § 21.103(a).

RIF process not applicable: The RIF process described in local policy does not apply to the termination of probationary contracts at the end of the school year or non-chapter 21 contracts at the end of the contract. See TASB Policy DFFA(LOCAL). As with at-will positions, the district should take steps to preserve its ability to respond to an allegation that an employee's dismissal was motivated by an illegal reason: the district should create and maintain adequate documentation that firing decisions were motivated by costs. Even though a formal RIF process is not required to terminate probationary contracts at the end of the school year, the district would be wise to develop and document a non-discriminatory method for identifying which positions will be cut.

Non-chapter 21 contracts: Typically, an employment contract that is not governed by Chapter 21 simply expires at the end of the contract term. No particular notice or process is required to end the employment relationship at that time, unless otherwise provided by local policy or the contract itself.

Practical Implications: Beware of the legally-expedient solution of terminating all probationary contracts at the end of the year. Although this solution presents little legal risk, it will eliminate much of the district's new talent and may harm future recruiting.

7. OFFERING EXIT INCENTIVES

Proposed Solution: In anticipation of the need for a RIF in the near future, the district would like to offer employees a financial exit incentive. The incentive would be available to all Chapter 21 contract employees, regardless of whether the employee is resigning or retiring.

Legal Ramifications:

Severance agreements: Employers often ask for severance agreements where employees receive a payment in return for relinquishing employment rights. A severance agreement is a legal contract between an employer and an employee that specifies the terms of an

employment separation, including a layoff or RIF. Typically, a severance agreement asks the employee to waive legal claims against the employer. A severance agreement is not necessary unless: (1) the employer wishes to obtain a waiver of employment rights; and (2) the employee is receiving a significant payment in return for the waiver.

According to the Equal Employment Opportunity Commission (EEOC), a waiver of discrimination claims in a severance agreement generally is valid when an employee knowingly and voluntarily consents to the waiver. A valid agreement must also: (1) offer consideration, such as additional compensation, in exchange for the employee's waiver; (2) not require the employee to waive future rights; and (3) comply with applicable state and federal laws. 29 U.S.C. § 626(f). Additional rules apply to the waiver of age discrimination claims for employees over 40. For more information, see [Understanding Waivers of Discrimination Claims in Employee Severance Agreements](#).

No bonuses: Severance payments must comply with the Texas Constitution's prohibition on gifts of public funds, which requires the governmental entity to receive consideration in return for compensation. Tex. Const. art. III, § 53. A severance payment may be defensible to the extent a waiver of legal claims is received, but the arrangement should be reviewed by district counsel. Tex. Att'y Gen. No. Op. JC-0165 (2000).

No retirement incentives: Finally, the Texas Education Code prohibits districts from offering or providing a financial or other incentive to encourage an employee to retire from TRS. Tex. Educ. Code § 22.007. Not all payments to a retiring employee are considered a retirement incentive. For example, an incentive offered to a large group of employees that happens to include some retirees probably is not a retirement incentive. Districts should work closely with their attorneys if incentives will implicate employees eligible for retirement.

Early notice incentives: Some districts have used early notice incentives to identify employees who already intend to resign, thereby limiting or avoiding the need for a RIF. An *early notice incentive* is a cash payment to employees who already intend to resign in return for early notice of resignation. The penalty-free resignation date falls around the middle of July for most districts, but districts begin staff planning for the next school year in the spring. Districts may offer an incentive to employees who agree to provide notice in the spring. More information on [early notice incentives](#), including a model form.

Practical Implications: To avoid these various stumbling blocks, any severance package should be designed with the advice and involvement of a school attorney.

Again, do not fail to factor in the cost of unemployment compensation. Even employees who take advantage of a voluntary severance package may be entitled to unemployment benefits, and these benefits will be paid over and above the amount of any severance. The

district may *not* ask an employee to waive the right to unemployment benefits; to do so is a criminal offense. Tex. Lab. Code §§ 207.072, .074. In the case of early notice incentives, however, if the resignation is truly voluntary and work was still available, the employee would not be eligible for unemployment. More information on [unemployment compensation and RIFs](#).

8. REDUCTIONS IN FORCE (OVERVIEW)

Proposed Solution: As part of its overall strategy for reducing positions, the district may need to eliminate some of its certified positions through a RIF.

Legal Ramifications:

A *reduction in force* (RIF) is the elimination of one or more job positions due to a financial exigency or program change. A RIF requires the board and superintendent to take several procedural steps designed to identify contract *positions*, not individual employees, to be eliminated. Generally, these steps include declaring a need due to financial exigency or a program change, identifying the affected employment areas, and systematically applying criteria to identify the individuals to be discharged.

Financial Exigency versus Program Change: The *board* must declare the need for a RIF. The two grounds for declaring a RIF are *financial exigency* and *program change*. Financial exigency is addressed at TASB Policy DFFA(LOCAL). Program change is addressed at TASB Policy DFFB(LOCAL).

Financial exigency is defined by commissioner rule. *Financial exigency* means the financial position of a district as a whole is such that the financial resources of the district are insufficient to support the district's instructional programs or the district is unable to finance the full compensation of staff for the current or succeeding fiscal year. 19 Tex. Admin. Code § 109.2001(a). Financial exigency may be declared by the board under one or more of the following conditions:

- A decrease of more than 20% in unassigned General Fund balance per student in weighted average daily attendance over the past two years or a projected reduction of 20% compared to the current year
- A decline in enrollment by more than 10% over the past 5 years
- A reduction of more than 10% in total General Fund total funding per student in weighted average daily attendance over one year or a projected reduction of 10% compared to the current year

- A natural disaster or casualty loss defined as damage, destruction, or loss of property resulting from an identifiable event that is sudden, unexpected, or unusual and that requires expenditures for repair or remediation in excess of 15% of the current year General Fund budget
- Any of the following, or combination of the following, that exceeds 15% of the current year General Fund budget: an unanticipated major expense, including significant repair costs; litigation expenses, excluding lawsuits against the state; or tax refunds
- Any other circumstances approved in writing by the commissioner

19 Tex. Admin. Code § 109.2001(b).

The declaration of financial exigency expires at the end of the fiscal year during which the declaration is made, unless the board adopts a resolution before the end of the fiscal year declaring continuation of the financial exigency for the following fiscal year. 19 Tex. Admin. Code § 109.2001(c). Each time the board adopts a resolution or an extension declaring financial exigency, the board must notify the commissioner within 20 calendar days of the adoption. 19 Tex. Admin. Code § 109.2001(d). The notice must include the date the resolution was adopted and the reason(s) for the declaration of financial exigency. The notice must be signed by the board president and superintendent and submitted to TEA.

Program change is defined by local policy. TASB Policy DFFB(LOCAL) defines *program change* as:

any elimination, curtailment, or reorganization of a program, department, school operation, or curriculum offering, including, for example, a change in curriculum objectives; a modification of the master schedule; the restructuring of an instructional delivery method; or a modification or reorganization of staffing patterns in a department, on a particular campus, or Districtwide.

A program change may be due to, for example, a redirection of resources; efforts to improve efficiency; a change in enrollment; a lack of student response to particular course offerings; legislative revisions to programs; or a reorganization or consolidation of two or more individual schools, departments, or school districts. The commissioner defers to reasonable local judgment in determining a program change: “[a] school district is always free to change its organizational structure as it seeks to increase its efficiency.” *Wassermann v. Nederland Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 171-R1-784 (Sept. 1, 1988).

Identifying affected employment areas: The *board* defines the scope of the RIF. *Bosworth v. East Central Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 090-R1-803 (Sept. 23, 2003). In accordance with TASB Policies DFFA(LOCAL) and DFFB(LOCAL), the superintendent recommends the employment areas to be affected. The board’s identification of affected employment areas is significant because, once the employment areas are defined, all employees *within* the identified areas must be considered for the RIF and no employees *outside* of the identified areas may be considered.

The employment areas to be affected by a RIF need not be limited to the examples in local policy. *Arredondo v. Brooks County Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 065-R1-0709 (Aug. 20, 2009). In determining the affected areas, the board may combine or coordinate areas. For example, instead of the areas of “elementary grades, levels, subjects, departments, or programs” and “library programs,” the board could define the employment area as “elementary school library programs.” *Westbrook v. Colorado Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 170-R1-599 (July 12, 1999).

Application of RIF criteria: The *superintendent* or designee applies the preset criteria from the district’s RIF policy to all employees in the affected employment areas to determine which employees will be recommended for discharge. The district’s RIF policy should specify the criteria, in order of importance, to be used to identify affected employees within the relevant employment areas. TASB Policies DFFA(LOCAL) and DFFB(LOCAL) list the following criteria in this order: Qualifications for Current or Projected Assignment; Performance; Extra Duties; Professional Background; and Seniority.

Practical Implications: When a board’s RIF decision is reversed, it is rarely due to the underlying reason for the RIF. Rather, if a RIF decision is reversed, it is usually because the board or administration did not follow the district’s own RIF policy. In particular, districts are frequently faulted for not applying selection criteria in the order specified in local policy. *See, e.g., Brown v. Killeen Ind. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 051-R1-0511 (July 5, 2011).

More information on [reductions in force](#) is available on our website.

9. RIF OF TERM CONTRACT POSITIONS (END OF CONTRACT)

Proposed Solution: After following its RIF policy step-by-step to identify affected individuals, the board has identified several term contract employees for discharge. The board may decide to end these contracts through the nonrenewal process at the end of the current school year.

Legal Ramifications:

The RIF process is a justification for discharge, not a substitute for the due process required to end a Chapter 21 contract. Typically, when single-year term contract employees are affected by a RIF, the RIF process leads to the end-of-year nonrenewal process. A reduction in force should be listed in board policy as a reason for term contract nonrenewal. See TASB Policy DFBB(LOCAL).

Before nonrenewal, consider reassignment: Once the superintendent has applied the RIF criteria to identify affected employees, those employees must be considered for other available positions in the district for which they are qualified:

A legitimate reduction in force is a valid reason for nonrenewal. However, it must be a reason for nonrenewal, not merely an excuse It does not constitute a reason if . . . there is another position for which the teacher is qualified, unless the district has a valid reason, supported by substantial evidence, for not reassigning the teacher to that position.

Parr v. Waco Indep. Sch. Dist., Tex. Comm’r of Educ. Decision No. 264-R1-689 (Apr. 11, 1991).

A district may require affected employees to express interest in open positions by applying and interviewing for the jobs. *Amerson v. Houston Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 022-R2-1202 (Feb. 10, 2003). Up until the date of the evidentiary hearing, an employee who applies for an open position must be offered the position if the employee meets the district’s objective criteria for that position and is the most qualified internal applicant. If no positions become available before the hearing, the district has no obligation to give the employee special consideration for vacancies that open up in the future. *Miget v. West Oso Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 136-R1b-783 (Apr. 11, 1984).

Nonrenewal deadlines and process: A board must follow the applicable statutory procedures to prevent a term contract from automatically renewing for another school year. To nonrenew a term contract, the board must: (1) provide the employee with notice of *proposed*

nonrenewal within the time specified by statute; (2) upon the employee’s request, provide a *formal hearing* on the proposed nonrenewal; (3) determine whether nonrenewal is appropriate under the board’s policies; *and* (4) timely notify the employee of its decision. Tex. Educ. Code §§ 21.206-.208. The employee may appeal the board’s decision to the commissioner. Tex. Educ. Code § 21.209.

As with probationary contract terminations, the deadline for notice of nonrenewal was moved in 2011 from 45 days before the last day of instruction to 10 days. Tex. Educ. Code § 21.206(a).

Practical Implications: The end-of-year nonrenewal process can be used only at the end of the final year of a multiple-year term contract. Because in practice most multiple-year term contracts are extended each year, these contracts rarely reach their final year. Consequently, the nonrenewal process may be unavailable for ending multiple year contracts after a RIF. On the advice of counsel, a district seriously anticipating a RIF in future school years might consider not extending or offering multiple-year term contracts.

Don’t forget to include the cost of unemployment compensation, described above, in the district’s cost analysis for the RIF.

10. RIF OF TERM, PROBATIONARY, AND NON-CHAPTER 21 CONTRACT POSITIONS (MID-CONTRACT)

Proposed Solution: After following its RIF policy step-by-step to identify affected individuals, the board has identified several term and probationary contract employees for mid-contract discharge. The board may decide to eliminate selected contracts, including multiple-year term contracts, through the statutory termination process.

Legal Ramifications:

The RIF process is a justification for discharge, not a substitute for the due process required to end a Chapter 21 contract. Typically, when multiple-year term or probationary contract employees are affected by a RIF, the RIF process leads to contract termination. See TASB Policies DFAA(LEGAL) and DFBA(LEGAL).

Before termination, consider reassignment: As with nonrenewal, once the superintendent has applied the RIF criteria to identify affected employees, those employees must be considered for other available positions in the district for which they are qualified. A district may require affected employees to express interest in open positions by applying and interviewing for the jobs. *Amerson v. Houston Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 022-R2-1202 (Feb. 10, 2003).

Up until the date of the evidentiary hearing, an employee who applies for an open position must be offered the position if the employee meets the district's objective criteria for that position and is the most qualified internal applicant. If no position becomes available before the hearing, the district has no obligation to give the employee special consideration for vacancies that open up in the future. *Miget v. West Oso Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 136-R1b-783 (Apr. 11, 1984).

Termination procedure: The procedure for the mid-contract termination of a Chapter 21 contract is the same for probationary or term contracts. The board must: (1) provide the employee with notice of *proposed* termination; (2) upon the employee's request, provide a hearing; (3) determine whether good cause exists to terminate the contract; and (4) timely notify the employee of its decision. The employee may appeal to the commissioner. Tex. Educ. Code §§ 21.251, .253, .257, .259, .301.

Most contract termination hearings are conducted by independent hearing examiners appointed by TEA. If the RIF is based on a financial exigency declared under Texas Education Code section 44.011, however, the board may opt to conduct the hearing itself. Tex. Educ. Code §§ 21.1041(2), .159(b)(2). In districts with 5,000 or more students, the board has a third option of designating an attorney to conduct the hearing. Tex. Educ. Code § 21.207(b-1).

Program change: Texas Education Code section 21.211 states that a board may terminate a term contract at any time for: (1) good cause as determined by the board; or (2) a financial exigency that requires a RIF. Tex. Educ. Code § 21.211(a). Similarly, a board may terminate a probationary contract at any time for good cause as determined by the board. Tex. Educ. Code § 21.104(a). The commissioner has repeatedly held that a RIF based on financial exigency meets the "good cause" standard required to terminate a Chapter 21 contract during the contract term. *See, e.g., Morales v. Austin Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 104-R2-0811 (Oct. 18, 2011) (upholding termination of teacher contract due to financial exigency and program change RIF); *Grant v. Arlington Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 090-R2-0711 (Sept. 8, 2011) (upholding termination of special education coordinator contract due to financial exigency and program change RIF).

A question exists as to whether a RIF due to a program change would be considered good cause to terminate, rather than nonrenew, a term contract, or to terminate a probationary contract in the middle of the school year. At least one hearing examiner has concluded that a program change is not good cause for a mid-contract termination. TASB Policy DFFB(LOCAL) limits a reduction in force due to program change to reductions based on the nonrenewal of term contracts.

Termination of non-Chapter 21 contracts: For non-Chapter 21 contracts, a standard other than “good cause” may apply to termination as the result of a RIF. *See, e.g., Firova v. United Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 029-R2-1208 (Apr. 13, 2012) (concluding that non-Chapter 21 administrator contract could be terminated by district due to program change based in whole or in part on administrator’s performance).

Practical Implications: If the district conducts the RIF process with transparency, most employees in affected positions will resign. If an employee resigns, the district does not have to complete the nonrenewal or termination process.

Don’t forget to include the cost of unemployment compensation, described above, in the district’s cost analysis for the RIF.

11. REDUCTION OF CONTINUING CONTRACT POSITIONS

Proposed Solution: After following its RIF policy step-by-step to identify affected individuals, the board has identified several continuing contract employees for discharge. The board may decide to eliminate selected continuing contracts through the statutory termination process.

Legal Ramifications:

Special process: The Texas Education Code prescribes special procedures to terminate or otherwise modify continuing contracts under a “necessary reduction of personnel,” as opposed to a “reduction in force.” Reductions in continuing contract employees must be made primarily based upon teacher appraisals and other criteria as determined by the board. Tex. Educ. Code § 21.157.

Most districts no longer issue continuing contracts. However, even districts that no longer issue these contracts may have employees who still hold older continuing contracts. Districts with continuing contract employees should consider adopting a local policy addressing reduction of continuing contract employees before beginning the RIF process.

Termination procedure: After a district follows its local policy to identify affected continuing contract employees, the board would use the statutory termination process to end a continuing contract. Tex. Educ. Code § 21.158. See TASB Policy DFCA(LEGAL). Most contract termination hearings are conducted by an independent hearing examiner appointed by TEA. Tex. Educ. Code § 21.251. If the RIF is based on a financial exigency declared under Texas Education Code section 44.011, however, the board may opt to conduct the hearing itself. Tex. Educ. Code § 21.159(b)(2).

Practical Implications: A district should work closely with its attorney when considering termination of any continuing contracts. Even experienced school attorneys consider it a challenge to coordinate the elimination of continuing contract positions with a RIF of term contract positions.

To avoid this challenge, the district could consider modifying rather than terminating continuing contracts. For example, the district might reduce the number of duty days and thus reduce salary for the next school year, as long as it does so before the penalty-free resignation date. *Sanford v. La Porte Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 262-R3-593 (Nov. 4, 1994). Such a solution would also help the district avoid the cost of unemployment compensation for a discharged employee.

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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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