



Fagen Friedman & Fulfroft LLP

Issues at the Bargaining Table

"Where the Rubber Hits the Road"

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I. OVERVIEW

Emerging Issues at the Table

- Salary and Health & Welfare Benefits
- Certificated Employee Workload
- Classified Employee Reclassification
- Transfer and Reassignment
- Hours of Work
- CSEA 610 Policy

II. SALARY AND HEALTH & WELFARE BENEFITS

Emerging Issues

- Funding for employee raises
- New CalSTRS limits on creditable compensation for certificated employees
- Affordable Care Act compliance

A. Bargaining under the New Funding Model

1. Current Economic Climate

- (a) California is experiencing its highest revenues in state history due to an improving economy, Prop 30 temporary taxes, and prior spending cuts, leading to increased funding for school districts.
- (b) By the end of 2015-2016, all funding cuts made during the recession will be restored, and the allocation for public education spending will stabilize at 40% of the state budget.
- (c) Prop 30 taxes expire in 2016 and 2018.
- (d) As the state moves toward full implementation of LCFF in 2021, annual incremental growth will be smaller. Eventually, all school districts will receive the cost-of-living adjustment ("COLA") only, estimated to be 2% to 4% annually.
- (e) Unions are seeking to capitalize on current high revenues by securing large, on-going salary increases now, before the increased funding normalizes.

2. Local Control Funding Formula ("LCFF"): The LCFF establishes concentration and supplemental funding for traditionally underserved students. In large part, the new funding formula eliminates categorical program. The LCFF emphasizes local school control on use and allocation of state funding.

3. Local Control Accountability Plan ("LCAP"): Beginning in the 2014-2015 school year, school boards were required to develop and adopt a LCAP to establish spending priorities under LCFF.

- (a) Before adopting the LCAP, school districts must *consult* with parents, community members, pupils, *local bargaining units*, and other "stakeholders." (Educ. Code § 52060.)

- (b) Unions have sought to negotiate the use of LCFF funds and LCAP development, thus elevating their "stakeholder" status.
- (c) Best practice: Negotiate with the unions based on the school district's priorities. Do not negotiate with the union to establish the school district's priorities.

4. Duty to Negotiate LCFF, LCAP, and Common Core

- (a) Under the EERA, school districts do not have a duty to bargain the underlying decisions that establish educational policies, goals, and objectives; determine curriculum; or establish budgetary priorities and allocations. PERB has long held that these areas are fundamental management prerogatives outside of the scope of bargaining. (*Riverside Unified School District* (1989) PERB Dec. No. 750; *Lake Elsinore School District* (1988) PERB. Dec. No. 2313.)
- (b) However, school districts may have the duty to bargain impacts and effects of those underlying decisions prior to implementing management's decision.
 - (i) This obligation to engage in "effects bargaining," may include how LCAP development will impact funding available for employee compensation, including salary and health and welfare benefits.
- (c) Additionally, school districts have a duty to meet and *consult* on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. (Gov. Code § 3543.2(a).)

5. Available Funding for Employee Compensation

- (a) LCFF/LCAP: Generally, employee compensation is funded through base grant revenues.
 - (i) Unions may seek to negotiate use of supplemental and concentration grant funds to support salary increases.
 - (ii) CDE has informed school districts that supplemental and concentration grant funds may be used to provide "more target salary increases to increase or improve services for unduplicated pupils," provided that is demonstrated in LCAP and proportional to allocation. (CDE Letter, dated June 10, 2015.)

- (b) Reserves: School districts maintain reserves to help manage cash flow, mitigate volatility in funding and expenditures, address unexpected costs, save for large purchases, and reduce borrowing costs. Generally, it is recommended that school districts maintain a reserve balance the equivalent of approximately two months of expenditures, approximately 17% of the school district's budget.
 - (i) The reserves of many school districts increased significantly under LCFF. Unions are currently emphasizing these high reserve amounts at the bargaining table to support proposals for large *on-going* increases to compensation packages.
 - (ii) Reserves are likely to decrease as school districts spend money in areas hit by the recession (e.g., facility maintenance, textbooks.). Unions may question the school district's "spending priorities" in light of past employee concessions.
 - (iii) SB 858 (2014) will cap school district reserves in any year following receipt of Prop 2 funds. Once in effect, assigned and unassigned reserves cannot exceed 2x of the applicable state minimum for unassigned reserves. For example, mid-size school districts will be capped at 6%, which represents less than 3 weeks payroll.

B. *Conversation Starter: What is your experience?*

1. Have the unions in your school district made a demand to bargain the LCAP? How did you handle the request?
2. Are the unions in your school district questioning the school district's reserve levels? How are you handling it?

C. Limits on Creditable Compensation for Certificated Employees: New CalSTRS regulations place limits on "creditable compensation," which is currently defined as a remuneration that is paid in cash by an employer to all persons in the same class of employees for performing creditable service in that position. (Educ. Code § 21119.2(a).)

1. Salary: The definition of salary contains four critical elements. Salary must be: (1) paid in cash for performance of creditable service; (2) stated as salary on a contract, salary schedule, etc.; (3) used as basis for future pay increases; and, (4) paid without requirement for proof of expenditure. (5 C.C.R. § 27400.)

2. Allowances: Under the definition of creditable compensation, allowances (e.g., transportation allowance; cash in lieu of fringe benefits; expense reimbursement) shall NOT be considered creditable compensation effective January 1, 2016. (5 C.C.R. § 27502.) These allowances were previously considered creditable under limited circumstances.
 - (a) As a result of the new limits on allowances, many school districts and unions are looking to restructure compensations packages to include moneys previously received as allowances. However, CalSTRS will not permit inconsistent salary increases to be considered part of creditable compensation.

3. "Consistent" Increases: CalSTRS classifies the following increases as "consistent" within the final 7 years of employment:
 - (a) A restructure of compensation that is a permanent change.
 - (b) A salary deferral due to a reduction in school funds.
 - (c) A commensurate percentage increase in compensation earnable for the majority of members employed by the same employer.
 - (d) A change in duties required of the employee that is incorporated in the first contract for the immediate successor to the position.
 - (e) An increase in responsibility of the employee that is incorporated in the first contract for the immediate successor to the position.
 - (f) Attainment of an educational or performance benchmark.
 - (g) An increase that establishes pay parity as demonstrated by any of the following:
 - (i) Commensurate compensation earnable for that same position in the past.
 - (ii) Commensurate compensation earnable for other employees performing similar duties for the same employer or other employers. (5 C.C.R. § 27600(a).)
 - (h) If an increase is determined to be "inconsistent," the compensation is creditable only to Defined Benefit Supplement ("DBS") program.

4. "Permanent" Restructuring: CalSTRS allowed school districts to permanently restructure base salary for a limited time. This permitted compensation that is no longer creditable (e.g., allowances) to be rolled into base salary. To be considered "permanent," the restructure must NOT

be: (1) implemented for a class of one and reversed upon hire of the immediate successor; or (2) made effective on or after January 1, 2015, and outside of the employer's standard bargaining or contract timeframes. (5 C.C.R. § 27600(d).)

- (a) If restructure is not "permanent," it is treated as inconsistent and the restructured compensation is creditable only to the DBS program.

5. *Conversation Starter: Something to consider in 2016...*

- (a) Although the designated time for restructuring has passed, can a permanent restructure be accomplished in 2016 if otherwise within the employer's standard negotiation timeframe?

6. Public Employees Pension Reform Act ("PEPRA"). To address pension spiking, AB 1381 (2014) added new provisions to the Education Code relating to CalSTRS members. As a result, certain salary restructures may be made for the benefit of providing an employee more pensionable compensation (e.g., moving non-creditable payments, such as employer health and welfare contributions, to the salary schedule).

- (a) For employees who became STRS members prior to January 1, 2013 ("2% at 60 members"), compensation will be earnable to the DBS program if CalSTRS determines it was "paid to enhance a member's benefits." (Educ. Code § 22119.2(g).)
- (b) For employees who became STRS members on or after January 1, 2013 ("2% at 62 members"), compensation STRS determines was "paid to enhance a member's benefits" will not be creditable to *any* CalSTRS account. (Educ. Code § 22119.3(b)(9).)

D. Health & Welfare Employee Contributions

- 1. Motivation: During the recession, many school districts negotiated "caps" on the school district's contribution to employee health and welfare ("H&W") benefits. Although funding has increased, H&W costs continue to increase. With unions seeking significant on-going salary increases, school districts are proposing long-term caps, or increases to existing caps, as a means to support the requested salary increases.
- 2. Types of "Caps": Generally, H&W caps fall into three categories:
 - (a) Hard cap. The school district contributes up to an annual maximum – anything above that amount is paid for by the employee. Future increases to the cap must be negotiated.

- (b) Soft cap. The school district contributes up to an annual maximum, which is automatically increased in each subsequent year by a specified amount (e.g., COLA, annual increase in H&W costs, excess above the cap in the previous year, etc.). Any cost above that amount is paid for by the employee.
 - (c) 50/50 cap. The employer contributes up to an annual maximum – anything above that amount is shared equally by the employer and employee.
3. ***Conversation Starter: The Relationship Between H&W Caps and CalSTRS Creditable Compensation.***
- (a) If additional funds are freed up in H&W costs, and those are moved on to the salary schedule, could CalSTRS view that as an "inconsistent" increase or payment to enhance a member's benefit?
4. The Affordable Care Act: Beginning 2016, the Affordable Care Act ("ACA") requires school districts to: (1) provide an "offer of coverage" to at least 95% of its full-time employees; and (2) offer "affordable" coverage. "Affordable" coverage means that the employee's contribution towards premiums does not exceed 9.5% of his/her household income.
- (a) A cap on employer H&W contributions may result in some lower-income employees falling below the "affordability" threshold. If any one of these employees receives a federal subsidy to purchase coverage on an exchange, the employer is liable for a \$3,000 annual penalty for that employee.
 - (b) ***Practice Pointer***: It may be in a school district's financial interest to pay the annual affordability penalty. School districts should assess the number of employees who may fall below the "affordability" threshold and determine the associated penalties and balance against the cost of increasing the school district's contribution to H&W benefits.
 - (c) ***Practice Pointer***: School districts should consider negotiating language that will increase the employer's contribution in the event any employee falls below the "affordability" threshold.
5. Opt-outs: To ensure ACA compliance, but to also give school districts and employees the ability to decline school district-provided health coverage (e.g., if they would prefer to join their spouse's coverage) school districts should document that an "offer of coverage" was made, and give the employee the express right to opt-out.

Bargaining Strategies

- Negotiate from your LCAP, not the other way around.
- Do not compromise important educational programs for the purpose of providing significant raises.
- Acknowledge the importance of providing significant raises, but emphasize the importance of ensuring those raises are supported by the budget.
- Do not give assurances on CalSTRS impact of any salary increase or restructure.
- Include with any H&W cap, a framework for an employer/union committee to jointly make recommendations on how to keep costs as low as possible. This, in addition to an employee contribution, will help ensure everyone has "skin in the game."

III. WORKLOAD NEGOTIATIONS FOR CERTIFICATED EMPLOYEES

Emerging Issues

- IEP team workload
- Technology-imposed additional workload
- Training programs (i.e. common core, CANRA) and their effects on workload
- Workload issues for virtual school employees

- A. Rules Pertaining to Workload Negotiations: The Public Employment Relations Board ("PERB") has recognized that the direction of the work force and determination of what work is to be performed by employees is a managerial prerogative, at the core of managerial control, and not subject to bargaining.
1. "Reasonably Comprehended" Tasks: However, managerial control is not unlimited. An employer's discretion to assign duties applies only to those tasks that are reasonably understood to be among the duties of the classification as established in the job description, in light of the entire educational program.
 2. New Job Duties: Employers must negotiate the decision and impacts/effects of the assignment of new duties or qualifications to an existing position, but they have no duty to negotiate changes to job descriptions that merely clarify existing duties. Generally, absent a contractual provision to the contrary, there is no duty to negotiate the initial assignment of duties to a truly new position.
 3. Hours of Work: Generally, an employee's "hours of work" are negotiable. The phrase "hours of work" has been broadly interpreted by PERB to include: (1) the hours of work on particular dates; (2) distribution of workdays in a week; (3) days worked per year; (4) shift schedules; (5) breaks and duty-free time during the day; (6) assignment of special duties; (7) teacher instructional hours; (8) extra hours assignments; and, (9) vacations and holidays.
 - (a) Distinguish from Instructional Time: The subject of employee work hours is distinguishable from student instructional time. The length of a school day is a management prerogative not directly related to length of teacher's workday, and therefore, outside the scope of representation.
 - (i) Exception: If student scheduling affects other mandatory subjects of bargaining, such as work load or length of workday, the effects are negotiable.

- (b) Preparation Time: Preparation time is a mandatory subject of bargaining because, if no preparation time is allotted, duties that would have otherwise been performed during that period must be completed outside the regular workday, thus extending an employee's work hours.

4. ***Conversation Starter: IEP Team Workload.***

- (a) Given the growing complexity of IEPs and the need for employee participation at IEP meetings, how have the duties of IEP team members expanded? How do you compensate employee participants for the additional time?

B. New Technologies: Employers may seek to implement newer technologies to improve existing job functions and its educational programs.

1. Generally, these underlying decisions are managerial prerogatives not subject to bargaining, unless the use of the technologies will result in new duties not reasonably comprehended within an employee's customary duties. However, there may be numerous negotiable impacts/effects that need to be addressed prior to implementation, including:
 - (a) The need for additional training and professional development to learn how to use the new technology prior to, or in conjunction with, implementation.
 - (b) The possibility that the new technology may be used outside of "regular" work hours.
2. ***Practice Pointer***: Provide the union written notice of the decision well before implementation to allow sufficient time for bargaining the impacts/effects and to learn the new technology.
3. ***Practice Pointer***: Many school district teacher evaluations are based on the California Standards for the Teaching Profession ("CSTP"). CSTP Standard 5 specifically includes the use of "available technologies to assist in assessment, analysis, and communication of student learning." Therefore, employees who are evaluated based on the CSTP, or similar standards, are *already* expected to utilize new technologies as part of their established duties (e.g., using online programs to publish assignments and grades to parents). This supports the argument that the decision to use new technologies is a management prerogative, but, the school district must still negotiate the impacts/effects prior to implementation.

4. ***Conversation Starter: The Challenges of New Technology.***
- (a) What new technology systems/programs has your school district implemented and what has been the union's reaction?
 - (b) Has the union's reaction impeded the school district's ability to implement the new system/program?
 - (c) Has the new technology system/program actually impacted employee work load, hours of work, etc.?

Bargaining Strategies

- Preparation is key – School district negotiators need to understand employee/union positions, and develop a strategy to appropriately answer their questions. Often the unions are concerned with how the new technologies will impact the workloads of employees who are less tech savvy.
- Job description duties should be broadly defined to allow for the assignment of duties "reasonably comprehended" to be a part of the position. However, school district do not be overly focused on the job description. Customary duties are the key, even if not written down.
- Even if a decision is non-negotiable, there may be negotiable impacts/effects. Give the union sufficient written notice of the decision well in advance of implementation to allow for meaningful negotiations.

IV. RECLASSIFICATION NEGOTIATIONS:

Emerging Issues

- Requests for reclassification for technology based job duties
- Duty to bargain the effects of reclassification
- Impact of reclassification on transfers and reassignments

- A. Classified Positions Generally: Each classified position has a designated title, a specific set of job duties and responsibilities, regular monthly salary range, and a regular work day and work year.
- B. Creating or Abolishing Classifications: Under the EERA, the decision to create a truly new job classification, or to eliminate a classification because certain functions are no longer needed, is not negotiable because management has an overriding interest in determining both the functions necessary to accomplish its mission and those that no longer serve its purpose.
1. Exception: If the "new" or abolished classification will result in transferring duties from an existing or recently abolished classification, both the decision and impacts/effects are negotiable.
 2. Wages and Job Title are Negotiable: Although the creation of a new classification is not negotiable, the wages and job title for the newly created position is negotiable.
 3. Must Negotiate Impacts/Effects: Although the creation of new classification is not negotiable, management must negotiate any effects of such a decision that fall within the scope of representation.
- C. Changes to Existing Classifications: PERB has held that changes to job specifications that result in an actual change in qualifications or any other term and condition of employment are negotiable. In contrast, changes that merely clarify the current qualifications and/or duties of a position are not negotiable. (*Alum Rock Elementary School District* (1983) PERB Dec. No. 322.)
1. ***Practical Pointer***: School districts may revise existing job descriptions to ensure that they are up-to-date. These types of clerical revisions do not need to be negotiated.

D. Reclassification Defined: A reclassification is defined as an "upgrading of a position to a higher classification as a result of the gradual increase of the duties being performed by the incumbent in such position." (Educ. Code § 45101(f).) Reclassified employees typically retain majority of their job duties and also assume additional duties.

1. Compare to Promotion: A promotion requires an employee to apply and be selected for a different position with a higher salary range maximum. An upward reclassification assigns an employee's current position to a new payroll title with a higher salary range maximum, based on a change in duties.
2. Merit System Process: A personnel commission may reclassify positions and employees within a merit system under the following conditions:
 - (a) All the positions in a class are reclassified to a higher class, incumbents of the positions who have been in the class for two or more years may be reclassified.
 - (b) The basis for reclassification must be gradual accretion of duties and not a sudden change by reorganization or assignment of completely new duties/responsibilities.
 - (c) An employee reclassified is ineligible for subsequent reclassifications for at least two years from initial action.

(Educ. Code § 45285.)

E. Reclassification Criteria: The sample criteria set forth below may be a helpful in developing reclassification criteria .

1. Potential Basis for Reclassification to an Existing or New Position:
 - (a) Substantial changes to the unit member's current job duties;
 - (b) Substantial changes to the job duties of the position to which the unit member is requesting to be reclassified;
 - (c) Substantial changes to the unit member's current working conditions;
 - (d) Substantial changes to the working conditions of the position that the unit member is requesting to be reclassified;
 - (e) Substantial changes to the unit member's level of expertise and/or qualifications;
 - (f) Significant and permanent changes in assigned responsibilities;

- (g) Changes in the level of complexity of assigned duties;
- (h) Changes in the nature of contacts with others;
- (i) Changes in organizational impact of the position;
- (j) Changes in the level of supervision received and/or exercised;
- (k) Changes in knowledge, skills, and abilities required to successfully perform in the position; and,
- (l) Whether the majority of the unit member's current job duties and responsibilities fit into an existing position.

2. Potential Criteria That Will NOT Be Considered in Reclassification Review:

- (a) Increased workload in current position;
- (b) Seniority or length of services in current position;
- (c) Length of time since unit member's last request reclassification;
- (d) Length of time since school district created a new position;
- (e) Qualifications that are irrelevant to the position to which the unit member is requesting to be reclassified;
- (f) Unit member's efficiency or diligence in performing his/her current job duties;
- (g) Scarcity of new employees;
- (h) School district or unit member's financial needs;
- (i) Unit member's personal characteristics;
- (j) Implementation of new technology;
- (k) Rapid turnover of employees in a classification; or,
- (l) Assuming duties on one's own behalf without knowledge of management.

F. Reclassification Studies and Special Considerations:

1. At times, school districts engage in formal reclassification studies to determine whether to reclassify an employee. When conducting a reclassification study, school districts should create overarching goals and objectives for the study and potential reclassification.
2. School districts should identify comparable school districts for the study, and determine if its current compensation is in-line with the market. In making this determination, it is important to be aware of your budget and the potential costs for reclassification, and how it may impact other issues, such as transfers and reassignments.

G. *Conversation Starter: Reclassification Trends.*

1. Has the classified union in your school district requested any reclassifications since the economy improved?
2. Has your school district initiated any reclassification studies?

Bargaining Strategies

- Be sure reclassification procedures are clearly outlined in the CBA.
- Update reclassification procedures to ensure they are effective for the employer and accessible for the employee, as well as up-to-date with external legal requirements.

V. TRANSFER AND REASSIGNMENT NEGOTIATIONS

Emerging Issues

- Attempting to loosen restrictions on employer's ability to transfer/reassign employees on an involuntary basis

- A. Under the EERA, transfers and reassignment policies and procedures are within the scope of representation. Collective bargaining agreements frequently contain three types of transfers: voluntary, involuntary, and administrative.
1. Voluntary Transfers: Voluntary transfers generally occur when an employee requests to be considered for a vacant position. Collective bargaining agreements frequently outline a procedure for processing employee requests for transfers.
 - (a) *Practice Pointers*:
 - (i) School districts may want to define specific criteria that will permit the school district to select best candidate for the position and preserve the school district's right to recruit outside candidates.
 - (ii) School districts should carefully define the term "vacancy" and the circumstances that trigger the process to fill a vacancy.
 - (iii) School districts should request language that allows management to determine whether an employee is qualified for a vacant position.
 - (iv) School districts may want to limit the number of voluntary transfers that are permitted each year.
 - (v) School districts may want to include language that allows school site principals to accept or reject voluntary transfer requests.
 2. Involuntary Transfers: Involuntary transfers are initiated by management, typically to address staffing needs. The procedures and restrictions related to involuntary transfers vary widely among school district. Some collective bargaining agreements restrict management's ability to

involuntarily transfer employees, while other agreements provide great discretion to management.

(a) ***Practice Pointers:***

- (i) With respect to seniority, school districts should consider providing employees an "edge" based on seniority. However, school districts should avoid a policy that is based entirely on seniority.
- (ii) School districts should clarify what due process rights, if any, attach to an involuntary transfer, including the right to access the grievance procedure.

3. Administrative Transfers: Administrative transfers are also initiated by management. The basis for an administrative transfer is typically more broad than that for an involuntary transfer. Administrative transfer provisions usually give management significant discretion.

(a) ***Practice Pointers:***

- (i) School districts should consider clarifying, and broadening, administrative transfer criteria, including the right to transfer employees based on management's determination of the "best interests" of the school district.
- (ii) School district may want to propose allowing management to transfer in conjunction with employee discipline.

B. ***Conversation Starter: Current Contract Language...***

- 1. What restrictions are currently placed on your school district in terms of employee transfers and reassignments?
- 2. Have these restrictions unreasonably limited your school district's ability to effectuate a much needed transfer?

Sample Contract Language

"Assignments/reassignments shall not be made for capricious or arbitrary reasons. No unit member shall be assigned/reassigned as a result of a disciplinary action or for a negative evaluation received within the past school year."

This type of language is common in collective bargaining agreements. If the union requires the discipline and evaluation limitation, school districts should clarify that the limitation exists for a short period of time (e.g., one year).

"The District may initiate an involuntary transfer at any time if such transfer is in the best interest of the unit member or the District."

This is broad and flexible language which is advantageous to the school district.

"Employees may be transferred due to:

1. A decrease in the number of pupils.
2. Elimination in programs and/or funding.
3. School closure.
4. Changes in curriculum or course offerings.
5. Possession of the appropriate credential.
6. A unit member's desire to change sites or assignments."

*This language restricts management's ability to involuntarily transfer an employee. This may make transfers difficult and subject to grievances. To address this restriction, consider adding, "Reasons an employee may be transferred shall include, **but not be limited to**, the following...."*

"Only procedural violations of either this article or the procedures set out in the current [insert handbook title, if applicable] shall be grievable. The substantive judgment of the District in filling positions or determining vacancies is not grievable."

This language is advantageous to the school district because only the school district's alleged failure to comply with the transfer procedures may serve as the basis for a grievance – the decision may not.

Bargaining Strategies

- Transfers/reassignments can be an effective administrative tool. Management should aim to achieve greater flexibility when (re)negotiating transfer policies and procedures.
- Avoid including deadlines for involuntary or administrative transfers/reassignment provisions (e.g. "The immediate supervisor may file a written request by April 30 for the transfer of an employee...").
- When drafting and proposing language regarding transfers, less is more. The fewer limitations, the greater flexibility.
- Take care to provide clear procedural steps for voluntary and involuntary transfers. Additionally, avoid procedures that create unnecessary hassle and confusion.

VI. OVERTIME PAY AND EXTRA WORK – RE-NEGOTIATION AND RE-EVALUATION

Emerging Issues

- Availability of and access to extra work
 - Contracting out bargaining unit work
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- A. Fair Labor Standards Act ("FLSA"): Federal overtime provisions are governed by the FLSA. Unless exempt, employees covered by the FLSA must receive overtime for hours worked in excess of 40 in a workweek, at a rate not less than time and one-half their regular pay rate. Teachers and other certificated employees are exempt from FLSA overtime provisions.
- B. Non-Exempt, Classified Employees: Generally, classified employees are entitled to overtime pay for "any time required to be worked in excess of eight hours in one day and in excess of 40 hours in any calendar week." (Educ. Code § 45128.)
1. Exempt Management: School districts may certify certain classified supervisory, administrative, or executive positions as management positions that are *exempt* from overtime. (Educ. Code § 45130.) The position must be "clearly and reasonably" a management position.
 - (a) To designate exempt management positions, the governing board must certify, in writing, that "the duties, flexibility of hours, salary, benefit structure, and authority of the positions or classes of positions are of such a nature that they should be set apart from those positions which are subject to the overtime provisions." (Educ. Code § 45130.)
- C. Adjusting Assignments ("20-Day Rule"): A classified employee who works more than thirty minutes in addition to his/her regular assignment for twenty or more days has a right to receive fringe benefits commensurate with the increased assignment. Additionally, the employee may have a right to an increased assignment.
1. Additional Fringe Benefits During Temporary Increase. Education Code section 45137 requires school districts to provide employees with additional fringe benefits during the increased assignment period. The statute does not specifically require the school district to permanently increase the employee's assignment.
 2. Permanent Adjustment of Work Hours. CSEA asserts that when an employee works thirty or more minutes per day in excess of his or her part-time assignment for twenty consecutive working days, the school

district must *permanently* increase the employee's basic assignment to reflect the additional hours.

3. ***Practical Pointer.*** To avoid an argument with CSEA, many school districts monitor the number of days that employees work thirty minutes or more in excess of their standard assignment.

D. **Contracting Out:** Under the EERA, an employer must negotiate the decision and impacts/effects of contracting out bargaining unit work to non-unit members. This may include circumstances where a contractor performs work during off-hours when a unit member could have had the opportunity for overtime work.

1. Common examples of situations that lead to allegations of inappropriate contracting out.
 - (a) "Volunteers" performing weekend work usually performed by unit members
 - (b) Students gaining job experience by working alongside employees.
 - (c) Contractors retrained when unit members are unavailable to work extra hours.
2. ***Practice Pointers:***
 - (a) School districts should negotiate clear procedures addressing the circumstances in which contractors may be used.
 - (b) School district should negotiate strong management rights clauses that reserve the right to "contract out."

Bargaining Strategies

- Clarify that Education Code section 45137, the 20-day rule, does not create a right to a permanent increase in hours.
- Know, in advance, what you are willing to give for increased workload (i.e. increase workload for only a few employees).
- Clarify procedures for authorizing overtime pay and contracting out.

VII. 610 POLICY AND THE NEGOTIATION PROCESS

Emerging Issues

- The 610 process and the duty to negotiate in "good faith"
- Interference with union internal organization
- Presence of 610 process in non-negotiation settings (i.e. discipline)

- A. CSEA Policy 610: Policy 610 is an internal CSEA policy that applies to negotiated agreements. The policy requires that tentative agreements be submitted to the labor relations representative assigned to the chapter, who, with his/her field director, reviews the agreement and issues a recommendation to the chapter president stating approval or disapproval, before the unit members may convene to ratify or reject the agreement. The policy states, in pertinent part:

All negotiated agreements shall be reviewed by the Labor Relations Representative and the Field Director. No chapter shall enter into a negotiated agreement or take a formal ratification vote, until it has been reviewed by the Labor Relations Representative and the Field Director.

(a) Negotiated agreements include any collective bargaining agreements, modifications thereof, memorandum of understanding, side letters, letters of understanding, or other contracted agreements between the chapter and the employer.

- B. Interference with Internal Process: Although the CSEA policy is not directly binding on school districts, the EERA prohibits school districts from interfering with the internal processes of unions. This includes the 610 process. Employers must therefore be cautious not to tell CSEA they cannot access the 610 process, even if it appears the 610 process should not, by its very definition, apply.

- C. Why is 610 Becoming Such an Issue?

- (a) CSEA has significantly expanded the applicability of the 610 process. They may now insist that it apply to not only negotiated employer/union agreements, but any form of employer/employee agreement (e.g., resignation agreement).
- (b) Under the EERA, the negotiating parties must have the authority to enter into an agreement, subject to normal ratification procedures. The 610 process, at least arguably, has stripped local chapters of their ability to reach agreement at the table. Agreements are now seemingly made between employers and "the mothership."

- (c) Many employers are frustrated that 610 is holding up agreements that traditionally were local matters.

D. ***Conversation Starter: Encroaching 610 Process...***

1. Has the 610 process become an issue in employee discipline negotiations and/or relatively insignificant negotiations with CSEA?
2. How has your school district addressed the issue?

Bargaining Strategies

- The 610 process can be frustrating not only for employers, but also for local chapters. Even CSEA labor representatives can be frustrated by it. School districts may find common ground with their local representatives on the issue.
- Attempt, whenever possible, to ensure any form of employer/employee agreement does not specify it must go through the 610 process. This may establish a bad precedent.
- Acknowledge the 610 process as it relates to any employer/union negotiated agreement. This will show the school district respects the 610 process as it applies to *those* types of agreements.