Memorandum on Late Certificated Layoffs

From the Office of General Counsel

Because of the dire state budget, a district may be forced to consider laying off certificated staff. This memorandum discusses the procedure for late certificated layoffs under California Education Code section 44955.5. The rules governing the process are very specific.

Determine if layoffs are needed – ascertain whether budget shows a shortfall

During the time period between five days after the enactment of the Budget Act and August 15 of the fiscal year to which that budget act applies, a governing board of a district may conduct an August layoff if the board makes two findings: (1) the district’s total revenue limit will not increase this budget year by at least 2 percent over the prior year; and (2) layoffs of this nature are necessary to protect the fiscal viability of the district.

Assuming a final state budget is passed around the beginning of the state’s fiscal year (July 1), districts are able to initiate an August layoff. This 45-day process must be complete by August 15.

Board to adopt a resolution

Reasonably promptly after receiving the budget showing a shortfall, the district board must prepare a resolution stating that services are to be reduced and/or discontinued, that it is necessary to reduce the staff, and specifying the extent of the reduction. The resolution must also direct the superintendent to notify affected employees. In addition, Education Code section 44955.5 permits the governing board to adopt a schedule of notice and hearing. With that exception, however, districts must comply the generally applicable layoff procedures set forth in Education Code sections 44951 and 44955.

A hearing should be conducted where the board presents the resolution, the public is given an opportunity to comment, and the resolution is adopted. The adopted resolution is then sent out.

Reserve a date for due process hearing at the OAH

Given the accelerated timeline for August layoffs and the anticipated influx of layoffs due to the COVID-19 situation, we recommend that districts reserve dates for due process hearings with the California Office of Administrative Hearings (OAH) at the same time or prior to the time the board adopts the resolution to conduct August layoffs. (Additional information regarding due process hearings is discussed, infra.) These due process hearings are typically held from April to early May for layoffs pursuant to Education Code section 44949. Again, Education Code section 44955.5 permits the governing board to adopt a schedule of notice and hearing. Presumably, for August layoffs pursuant to Education Code section 44955.5, the hearings should be held as soon as possible but no later than July to early August. As such, due process hearings with the OAH should be reserved for this timeframe.
**Initial Notification**

The superintendent or designee must send notice of the proposed layoff to each affected employee. The notice must advise the employee that the superintendent has recommended to the board that the employee be notified that his or her services will not be required for the following year, the reasons for the recommendation, and the employee’s right to request a due process hearing before an administrative law judge (ALJ) with the OAH to determine whether there is cause for not re-employing the noticed employee. The notices must be delivered personally or mailed by certified mail, return receipt requested. See Education Code section 44949 for further details concerning the content of the notice. Districts and COEs must maintain evidence of receipt of the notice by the employee. Although layoffs pursuant to Education Code section 44949 require notice to be provided by March 15, Education Code section 44955.5 permits the governing board to adopt a schedule of notice and hearing. Good practice would be to provide this notice as soon as possible after the board adopts the resolution regarding August layoffs.

**Hold due process hearing as requested**

As stated above, employees have the right to request a due process hearing. An employee may make this request within the time specified in the notice, which must be at least seven days after the date of service of the notice. The request must be in writing and must be delivered to the person who sent the notice. If the employee does not file a request for hearing on or before the specified date, he or she waives the right to a hearing.

If an employee requests a hearing, the proceeding is conducted by the OAH and a decision is made in accordance with the Administrative Procedure Act and Government Code sections 11500 et seq. All expenses of the hearing, including the cost of the ALJ, are paid for by the governing board. Local agency contract forms are available on OAH’s website. The process is described in more detail in the APA and Education Code sections 44949 and 44955.

The district is required to provide substitute teachers for all teachers that attend a hearing.

**Receive and review proposed decision of the ALJ**

There is no deadline specified in the Education Code for when a decision must be sent to districts or COEs by the ALJ for August layoffs, but, for layoffs pursuant to Education Code section 44949, a decision must be issued no later than by May 7, or approximately 8 days before the May 15 deadline for notices of termination. Presumably, for August layoffs pursuant to Education Code section 44955.5, a decision should be issued by the ALJ by August 7.

A copy of the proposed decision must be sent to all affected employees.
Make final layoff decisions and provide final notification

No later than August 15, the board either must approve the ALJ’s proposed decision or adopt a revised decision. In addition, notices of termination along with information regarding application for unemployment benefits must be given to employees subject to the layoff no later than August 15. This is the date by which notices need to be mailed, similar to the May 15 date.

Special Note

It should also be noted that districts should work closely with counsel in the layoff process. The legal issues surrounding layoffs are very complex and each district will have its own set of unique circumstances due to questions about seniority lists, employee classification, services to be reduced or eliminated, “bumping” rights, and specific MOU provisions. In addition, the August layoff statute has not been interpreted by any appellate courts and a number of terms within the statute may be subject to multiple interpretations. The layoff process should be conducted with careful planning, preparation and in conjunction with counsel.