



Personnel Issues During Epidemics and School Closings

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Each year, many Texas school employees cannot work when schools are affected by contagious illness, hurricanes, or other disasters. Infectious diseases and disasters may affect just a handful of employees, or they may result in the closing of one or more campuses. During epidemics and school closings, many districts wish to continue paying employees their regular wages in order to protect staff and students, maintain morale, and reduce employee turnover. In addition, districts may wish to pay a premium to employees who work during a disaster, especially if a district continues to pay other employees who are idled. The following FAQs address the legal principles relating to employee absences during a school closing.

Q: Is a district required to pay employees who do not work while the district is closed due to a disaster or pandemic?

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

Nonexempt employees: The FLSA does not require a district to pay nonexempt employees if the district is closed, even if employees would normally be scheduled to work. *Nonexempt employees* include both hourly employees and salaried employees whose duties do not qualify them for exemption from the FLSA's minimum wage and overtime requirements. In school districts, nonexempt employees include bus drivers, cafeteria workers, clerical staff, and instructional aides. Whether the district is closed for part of a day, part of a week, or a full week or more, the law does not require the district to pay these employees for time they do not work.¹

Exempt employees: The rules for employees who are exempt from the minimum wage and overtime laws depend on whether the employee is: (a) an educator; or (b) another exempt employee. Generally, state law requires districts to employ *educators* under contracts that provide for a minimum of 187 days of service.² The commissioner may reduce the number of days of service below 187 due to a calamity such as a disaster, flood, or extreme weather

¹ 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.

² Tex. Educ. Code § 21.401(b). An *educator* is a person who is required to hold a certificate issued by the State Board for Educator Certification. Tex. Educ. Code § 5.001(5). This includes classroom teachers, counselors, librarians, principals, and superintendents.

condition, but such a reduction by the commissioner does not reduce an educator's salary.³ It is uncertain whether a district may reduce days of service for an employee contracted in excess of the required minimum to an amount still greater than 187 days. A district that is facing such a situation should consult legal counsel.

For exempt employees who are not employed under a contract, such as business managers and transportation directors, the analysis depends on whether the district is closed for either a partial or full *workweek*.⁴ If an exempt employee works any part of a workweek—e.g., if a district is closed for only part of a week—the FLSA mandates that the employees be paid the full weekly salary.⁵ If a district is closed for a full workweek and an exempt employee performs no work, the FLSA does not require the district to pay the employee.⁶

Q: Is it permissible for a district to pay employees who do not work while the district is closed?

A: Yes. A district may pay employees even if it is not legally-obligated to pay them, if the district takes steps to avoid an improper use of public funds. Specifically, the 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 district receives a return benefit.⁷ In the case of temporary closings due to weather events or epidemics, some boards 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 district to authorize such payment by resolution or other board action. In a situation where the district faces risks of a health epidemic, a district may authorize payment to an employee staying home from work as a precautionary measure through board action.

To overcome a challenge that such a payment is a gift of public funds, the 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 school is closed will receive premium payments (see question below); and
4. the duration of the payments, which can be revisited if the district is required to remain closed for longer than anticipated.

³ Tex. Educ. Code §§ 21.401(c); 25.081(b).

⁴ 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. The rules applicable to exempt employees do not apply to teachers. 29 C.F.R. § 541.303.

⁵ 29 C.F.R. § 541.602.

⁶ 29 C.F.R. § 541.602.

⁷ Tex. Att'y Gen. Op. No. KP-0204 (2018).

TASB Policy Service has a template resolution to authorize wage payments during an emergency closing available in the TASB Regulation Resource Manual at DEA(EXHIBIT) and as an attachment.

Q: Can a district pay a premium to employees who are required to work while the district is closed?

A: Yes. A district may pay a premium to nonexempt employees who work during difficult times. For example, some employers pay hourly employees who work during closures a premium of time and one-half for regular hours. The district should be mindful that premium payments may affect the employee's hourly rate for overtime purposes during the relevant time period.⁸

Because a district is not legally required to pay a premium, the decision should be made in advance and should include the safeguards of public funds described in response to the previous question. This decision can be reflected in TASB Policy DEA(LOCAL) at Pay During Closing: Premium Pay During Disasters. If your district has not adopted such language and wishes to do so, the district's policy administrator should consult its policy consultant in TASB Policy Service for assistance.

Q: Will the district receive reimbursement from disaster funds for labor costs during school closings?

A: A district may be eligible for reimbursement of wages paid to employees who worked during a disaster-related closing. The Federal Emergency Management Agency (FEMA) Public Assistance Program and Policy Guide (PPAG) provides for reimbursement of some labor costs incurred during a disaster covered by a federal disaster declaration.⁹ Moreover, the district must have had a written policy in place, before the disaster, providing for the payment of these labor costs.

TASB Policy Service has language available relating to premium pay for work performed during disasters. The available text aligns with the current FEMA PPAG. The PPAG provides that FEMA determines eligibility for public assistance funding for overtime, premium pay, and compensatory time costs based on the district'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 district activates various pay types. Upon request, this language will be added to TASB Policy DEA(LOCAL) at Pay During Closing: Premium Pay During Disasters.

⁸ 29 C.F.R. § 778.108.

⁹ Federal Emergency Management Agency, [Public Assistance Program and Policy Guide](#) (Apr. 26, 2018).

The availability of funds for reimbursement after a disaster involves a case-by-case determination by FEMA based on the eligibility requirements in the PPAG. In determining eligibility for reimbursement, courts and administrative decisions defer to FEMA's discretionary authority. Districts should work with their local attorney on these issues.

Q: If the district schedules makeup days within the original instructional year, can contract employees be required to work the make-up days?

A: Yes. Contract employees are required to work the schedule described in their contracts and any related documents. As discussed above, state law generally requires educator contracts to provide for a minimum of 187 days of service.¹⁰ The commissioner may reduce the number of days of service if the number of instructional minutes is reduced.¹¹ However, the waiver of minutes of instruction is not the same as a waiver of days of service. If a district does not seek a waiver of the required days of service, the district may require contract employees to work the schedules under their contracts, including any make-up days.

Q: If the district is forced to modify its instructional calendar, can we require contract employees to work beyond their original end date without additional compensation?

A: Maybe. Contract employees are also protected by the work schedule described in their contracts and any related documents. For example, the Commissioner of Education has held that a teacher cannot be required to work after the last duty day specified in the work schedule distributed before the penalty-free resignation date.¹² Thus, the district must first determine what schedule the teacher agreed to work.

Q: If the district is forced to modify its instructional calendar, can we require noncontract employees to work beyond their original end date without additional compensation?

A: Probably not. Some districts continue wage payments to hourly employees during school closings. These districts may be tempted to treat such payments as an advance against any additional days of work required by the closing. However, the Texas Constitution prohibits governmental entities from advancing wages.¹³ Accordingly, a district should not treat wage payments to nonexempt staff during idle periods as advances against possible future services. In addition, the FLSA requires that nonexempt employees receive at least minimum wage for all hours worked and, where applicable, overtime pay. Thus, nonexempt employees who work further into the summer must be paid for their time.

¹⁰ Tex. Educ. Code § 21.401(b).

¹¹ Tex. Educ. Code §§ 21.401(c); 25.081(b).

¹² *Kelley v. North East Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 026-R10-1101 (Jan. 3, 2006).

¹³ Tex. Const. Art. III, § 52; Tex. Att'y Gen. Op. No. JM-1194 (1990).

Q: Do wage payments to contract employees during a school closing constitute an impermissible advance of wages?

A: Probably not. Most districts pay salaried employees who work a ten- or eleven-month schedule on an *annualized* basis—the salary is spread over twelve months. At any given time during the school year, these employees have earned more than the district has paid them. By the end of April, these employees have typically been paid 3/4ths of their salaries, with the remainder to be paid out over May, June, and July. Thus, continuing payments to these employees is not an advance of wages. Moreover, the 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.¹⁴

Q: Can employees use leave if the district is open, but they are unable to report to work during a disaster or for reasons related to pandemic influenza?

A: Maybe, depending on the district’s local leave policy. Districts should follow their normal leave policies for employees who miss work due to a disaster or a routine illness. During a disaster, some employees will be unable to come to work because roads are impassable or because they must deal with personal matters, such as lost housing or insurance claims. During a pandemic, some employees will miss work because they have potentially been exposed to an illness, are themselves sick, because a family member is sick, or because their children’s schools and daycare facilities are closed.

If the employee or family member is sick or injured, the employee may be able to access state or local leave, subject to the district’s usual medical certification requirements. Depending on the severity of illness, the employee may also be able to access Family and Medical Leave Act and/or temporary disability leave.

Disaster-related illnesses will fall under most districts’ leave policies. Most districts define “family emergency” for purposes of state sick leave accrued before the 1995-96 school year as “disasters . . . involving the employee or a member of the employee’s immediate family.” Most districts apply this same definition to non-discretionary personal leave, both state and local.

In the case of an epidemic, a district 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 district’s local needs and address whether leave for a quarantine is paid or unpaid, covers a voluntary quarantine or a district-requested quarantine, the number of days of leave, 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.

¹⁴ Tex. Att’y Gen. Op. No. JC-0080 (1999).

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

Use of leave for childcare purposes is more complicated. A district may reasonably interpret the term “disaster” to encompass situations where an employee is unable to work because school or childcare facilities are closed due to a pandemic. This is a local decision. Another option is for the district to waive limits on the use of discretionary leave. Many districts have local policies that limit the number of consecutive days an employee may use discretionary leave. The board may opt, through formal vote, to waive or suspend these limits to allow employees who are unable to work for childcare reasons relating to a disaster or pandemic illness to use that leave. If a district chooses to waive limits for these reasons, the district should also specify the documentation it will require to support the use of discretionary leave for childcare purposes.

Q: May a district authorize a leave donation bank for employees absent because of disaster-related circumstances?

A: Yes. The creation of a leave-sharing plan for use after a major disaster is a local decision that can be reflected in a district’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. 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.¹⁵ In crafting the policy language, the district 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 district is closed?

A: Maybe. Whether a closure counts against an employee’s 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.¹⁶ 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. If, on the other hand, an employee is using FMLA leave in increments of less than one week, the closure will not count against the employee’s FMLA

¹⁵ I.R.S. Notice 2006-59, Bulletin No. 2006-28 (July 10, 2006).

¹⁶ 29 C.F.R. § 825.200(h).

entitlement unless the employee was otherwise scheduled and expected to work on the day school 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.¹⁷ According to the regulations, closures of a week or more do not count toward an employee's FMLA leave.

This document is continually updated, and references to online resources are hyperlinked, at tasb.org/services/legal-services/tasb-school-law-esource/personnel/documents/personnel-issues-during-epidemics-and-school-closings.pdf. For more information on this and other school law topics, visit TASB School Law eSource at schoollawesource.tasb.org.

This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is not an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. Consult with your own attorneys to apply these legal principles to specific fact situations.

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¹⁷ 29 C.F.R. § 825.200(h).

Appendix

- A. Resolution of the Board Regarding Wage Payments during Emergency School Closings (Includes Premium Pay), also available in the TASB Regulations Resource Manual at DEA(EXHIBIT)
- B. Resolution of the Board Regarding Wage Payments during Emergency School Closings (No Premium Payment) also available in the TASB Regulations Resource Manual at DEA(EXHIBIT)
- C. Resolution of the Board Regarding Extension of Leave during Precautionary Exclusion
- D. Resolution of the Board Regarding Extension of Leave during Precautionary Exclusion

Appendix A

Resolution of the Board Regarding Wage Payments during Emergency School Closings (Includes Premium Pay)

[This sample resolution is for districts 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 Texas Education Code section 45.105 to expend funds of _____ School District for purposes necessary in the conduct of the public schools as determined by the Board;

WHEREAS, the Board acknowledges that during an emergency closing, most District 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 District 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 District staffing when schools reopen; and

[Include the text below if the District'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 _____ School District 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 District'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 District intends to seek reimbursement from FEMA for extraordinary costs for essential employees who are required to perform disaster-related emergency work, the District 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 _____ School District 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 School 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 Texas Education Code section 45.105 to expend funds of _____ School District for purposes necessary in the conduct of the public schools as determined by the Board;

WHEREAS, the Board acknowledges that during an emergency closing, most District 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 District 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 District staffing when schools reopen;

NOW, THEREFORE, BE IT RESOLVED that the Board of Trustees of _____ School District 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 Precautionary Exclusion¹

WHEREAS, the Board is authorized by Texas Education Code section 45.105 to expend funds of _____ School District for purposes necessary in the conduct of the public schools as determined by the Board;

WHEREAS, the Board acknowledges that during an epidemic, District 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 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 _____ School District 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 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 local/state leave is exhausted. Additionally, a district may decide to edit this resolution to authorize only unpaid leave (e.g.: job protection). If the district determines that it will deduct from the employee’s daily rate for each day of extended sick leave taken, that information should also be reflected in the resolution or accompanying regulations.

[Include the text below if the District 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 Epidemic²

WHEREAS, the Board is authorized by Texas Education Code section 45.105 to expend funds of _____ School District for purposes necessary in the conduct of the public schools as determined by the Board;

WHEREAS, the Board acknowledges that during an epidemic, District 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 _____ School District 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 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 local sick leave for all regular employees who have exhausted available state and local leave days. The district will determine the maximum duration of the leave. Additionally, a district may decide to edit this resolution to authorize only unpaid leave (e.g.: job protection). If the district 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 district can revise the resolution to cover extended leave for the care of a member of the employee’s immediate family who is sick.