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LEGAL UPDATE

March 2, 2009

To: Superintendents, Member School Districts (K-12)

From: Carl D. Corbin, Schools Legal Counsel *CAC*

Subject: **Impermissible to Deduct Vacation Leave and Differential Leave
Concurrently for a Classified Employee
Memo No. 08-2009**

On January 26, 2009, the California Court of Appeal, Fourth District, published its decision in *California School Employees Association v. Colton Joint Unified School District* (2009) 88 Cal.Rptr.3d 486 holding that a school district which had adopted the 100-day rule for differential leave¹ set forth in Education Code section 45196, could not deduct vacation leave and differential leave concurrently for a classified employee.

Because Colton's practice of combining vacation leave and differential leave concurrently is not a subject of agreement under the collective bargaining agreement and because it contradicts section 45196, it cannot be validated by this court. (*Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 285-286) Haynes's statutory rights as a classified employee prevail over the provisions of the collective bargaining agreement. (*Tracy Educators Assn. v. Superior Court* (2002) 96 Cal.App.4th 530, 539; *California School Employees Assoc. v. Travis Unified School Dist.*, 156 Cal.App.3d at pp. 248-250.)

The *Colton* Court reached its conclusion despite language in the collective bargaining agreement and over 20 years of district past practice that allowed for the concurrent deduction of vacation leave and differential leave for classified employees. Although this case specifically addresses school districts that have adopted the 100-day rule for differential leave, it serves to remind all districts that differential leave, whether occurring under the 5-month rule or the 100-day rule, should be applied consecutively to other paid leave.

¹ Differential leave is also commonly referred to as "extended sick leave" or "other sick leave."

To clarify, classified school employees are entitled to several kinds of leave when injured or ill:

- 60 days of industrial and illness leave when the illness/injury occurred on the job²;
- Current sick leave;³
- All accrued sick leave⁴;
- All vacation leave, compensatory time, and any other paid leave⁵; and
- Finally, the balance of up to 5-months of differential leave, subtracting the actual costs paid a substitute hired to fill the employee's position while on leave, or up to 100 days of differential leave at half-pay.⁶

For example: An employee is injured on the job and uses all 60 days of industrial and illness leave. The employee then uses all current sick leave (12 days) and all accrued sick leave (25 days); the employee then uses all accrued vacation leave (20 days); and finally the employee is entitled to use 100 days of differential leave minus any used sick leave, which in this case is $(100 - 37 = 63)$ 63 days at half-pay.

Districts should also ensure that employees are promptly sent notices informing them of their rights under the federal Family and Medical Leave Act ("FMLA") and California Family Rights Act ("CFRA") and the commencement of the qualifying leave.

Just prior to exhaustion of all applicable leaves, districts should send employees a letter informing them of their right to request an unpaid leave of absence from the district board⁷ and notice that they will be placed on the district's 39-month re-employment list in the event the leave request is denied as all leaves, paid and unpaid, will have been exhausted.⁸

Given the complexities of properly determining leave rights and designation obligations applicable to school district employees, our office has model FMLA/CFRA designation letters, leave notices, as well as 39-month re-employment list notices available for our clients. Such letters and notices should be tailored to reflect individual employee/district situations.

Please contact any of the attorneys in our offices if you have questions with this or any other legal issue.

² Education Code section 45192.

³ Education Code section 45191—12 days per year for 12 month employees working full time and prorated for others working less.

⁴ Education Code section 45191.

⁵ Education Code section 45197.

⁶ Education Code section 45196—it is the amount actually paid the substitute except in districts that have adopted a salary schedule for substitutes; for district adopting the 100-day rule, the 100-days are in addition to current sick leave under 45191 and paid at not less than 50% of the employee's regular pay.

⁷ Education Code section 45199.

⁸ Education Code section 45195.