



# LAW UPDATE

## LABOR AND EMPLOYMENT

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### EDUCATION CODE §44908 MEANS WHAT IT SAYS: NO “ROUNDING UP” OR SUBSTITUTING “HOURS” FOR “DAYS”

This past summer, California’s Second District Court of Appeal upheld the denial of a probationary counselor’s writ petition to compel the Los Angeles Unified School District (LAUSD) to reinstate her, with commensurate pay and benefits, as a permanent certificated employee. *Cox v. Los Angeles Unified School District* (July 23, 2013) 218 Cal.App.4<sup>th</sup> 1441. The probationary employee, Erica Cox, who was just 1.5 days shy of working “at least 75 percent of the number of days the regular schools of the district ... are maintained” (EC 44908) in her second consecutive probationary year, argued that additional “hours” worked and/or “rounding up” count toward permanent status. In strictly construing the Education Code, the trial and appellate courts disagreed.

Cox successfully completed her first probationary year (2007-2008) as a high school counselor with LAUSD, working a normal day of six hours. During her second probationary year (2008-2009), which had 182 work days, Cox was on paid maternity leave for the first 60 days. For the 2009-2010 school year, Cox was classified by LAUSD as a second year probationary employee because she did not work a “complete school year” during 2008-2009. In March of 2010, LAUSD notified Cox of non-re-election and lay off.

Education Code 44908 defines a “complete school year” as “at least 75 percent of the number of days the regular schools of the district ... are maintained....” A probationary employee like Cox must serve “two complete consecutive school years in a position or positions requiring certification qualifications” prior to becoming classified as a permanent employee. (EC 44929.21(b)) Cox advanced two arguments to get her to permanent status: (1) she worked 30 hours on a grant application which, in effect, adds 5 days; and (2) she worked a partial day of 3 ½ hours which, if counted and rounded up from 74.7 percent, meets the “complete year” requirement.

In rejecting both claims, the appellate court noted it cannot overlook the clear language in the relevant sections of the Education Code, no matter how draconian the result may seem. First, whether

Cox worked the 30 hours of grant writing during her maternity leave or not, she was paid no other compensation other than “maternity leave pay” during her leave. Time when a probationary employee is on a “leave of absence” does not count towards the “complete school year” requirement of §44908. (EC 44975) The 75 percent physical attendance requirement equates to “experience” which is a condition to achieving permanent status. Moreover, because §44908 refers to just “days,” not “hours,” any additional hours worked in a normal workday (as well as hours worked on Saturday or Sunday, which are not regular school days) do not yield another “day.”

As for Cox’s partial day (3 ½ hours) claim, the court again stressed that §44908 states “at least 75 percent of the number of days....” There is no reference to “hours” or “rounding up.” When the Legislature says “at least 75 percent of the number of days,” the court cannot interpret the statute to mean something else (i.e., “hours” or slightly less than 75 percent, or 74.7 percent). Cox, therefore, was properly classified as a probationary employee in 2009-2010 by LAUSD and, in March 2010, was properly notified that she was non-reelected effective at the end of that year.

This case provides two lessons: (1) district recordkeeping is critical when determining “a complete school year” for purposes of permanent status; and (2) the Education Code “means what it says” in the context of counting days towards permanent status. Should you have any questions concerning this topic, we encourage you to please contact our office.

– Kelly A. Lazerson

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